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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1966

No. 78

DEPARTMENT OF EMPLOYMENT, ET AL.,
APPELLANTS,

vs.

UNITED STATES, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

FILED FEBRUARY 28, 1966
JURISDICTION POSTPONED MAY 23, 1966

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. .....

THE AMERICAN NATIONAL RED CROSS and THE UNITED STATES OF AMERICA, Plaintiffs,

v.

DEPARTMENT OF EMPLOYMENT, and BERNARD E. TEETS, Executive Director of Employment of the Department of Employment, Defendants.

COMPLAINT—Filed October 7, 1963

The American National Red Cross and the United States of America, by their undersigned attorneys, allege that:

1. Plaintiff The American National Red Cross (hereinafter sometimes referred to as "Red Cross") is a body corporate and politic in the District of Columbia, organized and existing by virtue of an act of the Congress of the United States of America (Title 36 U.S.C. Sec. 1 et seq.) and does not have its principal place of business in the State of Colorado.

2. Plaintiff United States of America is a corporate sovereign and body politic.

3. Defendant Department of Employment (hereinafter sometimes referred to as "Department") is an agency of the State of Colorado, charged with the function of administering the Employment Security Act of the State of Colorado (Colorado Revised Statutes 1953, as amended, Chapter 82) hereinafter referred to as the "Act."

[File endorsement omitted]

4. Defendant Bernard E. Teets is the Executive Director of Employment and as such is head of the Department.

5. Jurisdiction of this court rests on (a) Title 28 U.S.C. Sec. 1331, the amount in controversy exceeding ten thousand ($10,000) dollars, exclusive of interest and costs, and the suit arising under the Constitution and laws of the United States; and (b) Title 28 U.S.C. Sec. 1345, this being a civil suit commenced by the United States.

[fol. 2] 6. Red Cross is an instrumentality of plaintiff United States of America and, as such, enjoys immunity, under the federal Constitution, from state and local taxation.

7. The Department determined that Red Cross employment in Colorado was subject to the Act and demanded that it make payment of the contributions provided for by Article 6 thereof and, in accordance with Article 9 of the Act, interest on contributions which were claimed to be past due.

8. Thereafter, Red Cross, in compliance with the Department's demand, involuntarily and under threat and fear of sanctions provided for by the Act, paid defendants under protest and applied to the Department for refund of an amount in excess of $10,000. The Department denied Red Cross' applications for refund.

9. Red Cross made said protests and applications for refund of payments, and now rests this action, on the ground that it is an instrumentality of the United States of the kind described by Title 26 U.S.C. Section 3306(c)(6)(B) and, as such, continues, because of the express exception made in Title 26 U.S.C. Section 3305(b), to be immune, under the federal Constitution, from any requirement to make contributions to any unemployment fund under a State unemployment compensation law.

10. Red Cross contends that it is an instrumentality of the United States of the kind described by Title 26 U.S.C. Section 3306(c)(6)(B) because subdivision 8 of Section 3306(c) (which specifically refers to Section 3301 of Title

26 U.S.C.) exempts Red Cross (which is an organization described in Title 26 U.S.C. Section 501(c)(3) and exempt from income tax under Title 26 U.S.C. Section 501(a)) from the application of Section 3301.

11. The Department takes, and in making its said determination and demand and denying said applications for refund took, the position that Congress, by Title 26 U.S.C. Section 3305(b), has subjected Red Cross to, rather than excepted it from the requirement of making contributions to unemployment funds under State unemployment compensation laws.

[fol. 3] 12. The United States of America agrees with Red Cross and disagrees with the Department in their respective interpretations of Title 26 Section 3305(b) and 3306(c)(6), and has joined in this action, under the direction and authorization of its Attorney General, because of its interest as sovereign, in having Sections 3305(b) and 3306(c)(6) properly construed and applied, and avoiding infringement of the immunity from state and local taxation which the United States and Red Cross, as its instrumentality, performing functions essential to the military and civil interests of the United States, enjoy under the federal Constitution.

13. Since Congress has not consented thereto, exaction by defendants from Red Cross of the contributions and interest charges provided for by the Act is in violation of the federal Constitution; and the Act, insofar as it provides for such exactions from Red Cross, is unconstitutional.

14. Defendants threaten to impose all penalties and interest charges, and resort to all summary remedies for collection of contributions, interest and penalties, provided for by the Act, if Red Cross does not continue making payments when claimed to be due thereunder.

15. No plain, speedy, and efficient remedy is available to Red Cross in the courts of Colorado, against defendants

threatened enforcement of the Act, in that, among other things, the Act provides that all refunds of moneys erroneously paid thereunder shall be without interest.

16. Red Cross will suffer irreparable injury unless defendants are permanently enjoined from assessing or collecting any contributions, interest or penalties under the Act against Red Cross, in that, among other things, it will be put to the expense and inconvenience of multiple suits as plaintiff or defendant.

17. The relief prayed for herein requires this case to be heard by a court of three judges.

Wherefore, plaintiffs pray judgment as follows:

1. Declaring that application of the Act to Red Cross is unconstitutional; and

2. Directing defendants to refund to Red Cross all sums heretofore or hereafter collected by them from it under [fol. 4] the Act, together with interest on each such sum from the respective date of receipt thereof; and

3. Permanently enjoining defendants, their officers, agents, servants, employees and attorneys, from assessing or collecting any contributions, interest or penalties under the Act from Red Cross; and

4. Granting plaintiffs such other and further relief, including costs, as may be just and proper in the premises.

Jack D. Henderson, Attorney for Plaintiff, The American National Red Cross, First National Bank Building, Denver, Colorado, AM 6-3327.

Lawrence M. Henry, United States Attorney for the District of Colorado, Attorney for Plaintiff, United States of America, 348 Post Office Building, Denver, Colorado, 534-4151, Ext. 541.

[fol. 5]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

[Title omitted]

MOTION TO STRIKE PORTION OF COMPLAINT—
Filed October 28, 1963

Defendants, Department of Employment and Bernard E. Teets, through their attorneys, Duke W. Dunbar, Attorney General, Frank E. Hickey, Deputy Attorney General, and James D. McKevitt, Assistant Attorney General, move to strike paragraph 12 of Plaintiff's Complaint, and, as grounds therefor, state:

That this allegation is immaterial to the Plaintiff's claim for relief.

Duke W. Dunbar, Attorney General; Frank E. Hickey, Deputy Attorney General; James D. McKevitt, Asst. Attorney General, By James D. McKevitt, Asst. Attorney General.

[File endorsement omitted]

[fol. 6]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

[Title omitted]

MOTIONS TO DISMISS—Filed October 28, 1963

Defendants, Department of Employment and Bernard E. Teets, through their attorneys, Duke W. Dunbar, Attorney General, Frank E. Hickey, Deputy Attorney General, and James D. McKevitt, Assistant Attorney General, move to dismiss the claims of the Plaintiffs, and as grounds therefor, state:

[File endorsement omitted]

1. The Court does not have jurisdiction over the subject matter.

2. The Court does not have jurisdiction over the Defendants.

Motion to Dismiss Against the United States of America

In the alternative, Defendants, Department of Employment and Bernard E. Teets, move to dismiss the claims of the United States of America, and, as grounds therefor, state:

That the Plaintiff, United States of America, has failed to state a claim upon which relief can be granted.

Duke W. Dunbar, Attorney General; Frank E. Hickey, Deputy Attorney General; James D. McKevitt, Asst. Attorney General, By James D. McKevitt, Asst. Attorney General.

[fol. 7] Certificate of Mailing (omitted in printing).

[fol. 8]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 8233

[Title omitted]

MOTION OF PLAINTIFFS FOR SUMMARY JUDGMENT—
Filed November 21, 1963

Plaintiffs, by their respective undersigned attorneys, move the court as follows:

1. Pursuant to Rule 56 of the Federal Rules of Civil Procedure, for a summary judgment granting the relief prayed in the complaint on the grounds that there is no genuine issue as to any material fact, and that on the estab-

[File endorsement omitted]

lished facts plaintiffs are entitled in law to the relief prayed; and, in the alternative,

2. If plaintiffs are not granted summary judgment on the whole case or for all the relief prayed, and a trial is necessary, the court, at the hearing of this motion, by examining the complaint and the evidence before it and by interrogating counsel, ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted, and thereupon make an order specifying the facts that appear without substantial controversy and directing such further proceedings in the action as are just.

This motion is based upon:

(a) Plaintiffs' complaint filed herein; and

(b) The annual report for the year ended June 30, 1962, of which a copy is attached to Plaintiffs' Memorandum In Opposition To Defendants' Motions To Dismiss and To Strike filed herein; and

[fol. 9] (c) The attached affidavits sworn to November 20, 1963, by Harold W. Starr and Presnell K. Betts.

Lawrence M. Henry, United States Attorney.

Jack D. Henderson, Attorney for Plaintiff, The American National Red Cross.

November 20, 1963.

[fol. 24]
[Stamp—Filed—United States District Court—Denver, Colorado—Jan 10 1964—G. Walter Bowman, Clerk—By Dep. Clerk]

Form No. USA-20
(Rev. 10-9-58)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Civil No. 8233

THE AMERICAN NATIONAL RED CROSS, et al., Plaintiffs,

v.

DEPARTMENT OF EMPLOYMENT, et al., Defendants.

CERTIFICATE OF SERVICE BY MAIL

The undersigned hereby certifies that he is an employee in the Office of the United States Attorney for the District of Colorado, and is a person of such age and discretion as to be competent to serve papers.

That on January 10, 1964, he served a copy of the attached 1) Plaintiffs' Reply Brief; 2) Reply Affidavit in Support of Plaintiffs' Motion for Summary Judgment; 3) Reply Affidavit in Support of Plaintiffs' Motion for Summary Judgment by placing said copy in a postpaid envelope addressed to the person hereinafter named, at the place and address stated below, which is the last known address, and by depositing said envelope and contents in the United States Mail at Denver, Colorado.

Addressee:

Mr. James D. McKevitt
Assistant Attorney General
State Capitol
Denver, Colorado 80203

Arthur L. Fine, Assistant United States Attorney, for the District of Colorado.

[fol. 25]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

[Title omitted]

ORDER ON MOTIONS—March 18, 1964

This Cause came before this Statutory Court on the motions of the parties and after hearing the arguments of counsel, it is,

Ordered as follows:

1) That the defendants' motion to strike paragraph 12 of the complaint be granted.

2) That the defendants' motion to dismiss is granted only as to the plaintiff, The United States of America.

3) That the motions for summary judgment of both the plaintiffs and defendants be denied.

4) That the defendants shall have fifteen days within which to file an answer to the complaint.

Dated at Denver, Colorado, this 4th day of March, 1964.

[fol. 26] By the Court:

Oliver Seth, Circuit Judge, United States Court of Appeals;

Alfred A. Arraj, Chief Judge, United States District Court;

Hatfield Chilson, Judge, United States District Court.

[File endorsement omitted]

[fol. 27]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 8233

[Title omitted]

ANSWER—Filed March 26, 1964

Defendants, Department of Employment and Bernard E. Teets, through their attorneys, Duke W. Dunbar, Attorney General, Frank E. Hickey, Deputy Attorney General, and James D. McKevitt, Assistant Attorney General, in response to order of Court to hereby submit their Answer to the Plaintiff's Complaint:

1. The Defendants are without sufficient information or knowledge to form a belief as to the provisions of paragraph 1 and 2 of Plaintiff's Complaint and therefore deny each and every allegation thereof.

2. Defendants admit that the Colorado Department of Employment is an agency of the State of Colorado and that the Defendant, Bernard E. Teets is the Executive [fol. 28] Director thereof: Defendants further admit that the Colorado Department of Employment has previously ruled that the Plaintiff, American National Red Cross, is a subject employer under the provisions of the Colorado Employment Security Act, Chapter 82, 1953 C.R.S., and is liable for the payment of contributions and/or taxes as is required under the provisions of this Act.

3. Defendants deny each and every other allegation of the Plaintiff's Complaint not previously admitted herein.

[File endorsement omitted]

First Affirmative Defense

As a separate and affirmative defense to the Plaintiff's Complaint, Defendants allege that this Court does not have jurisdiction over the subject matter.

Second Affirmative Defense

As a separate and affirmative defense to the Plaintiff's Complaint, Defendants allege that this Court does not have jurisdiction over the Defendants.

Third Affirmative Defense

As a separate and affirmative defense Defendants submit that the Plaintiff, American National Red Cross has failed to exhaust its administrative and statutory remedies afforded to and required of it under the provisions of Section 82-9-9, 1953 Colorado Revised Statutes.

[fol. 29] Fourth Affirmative Defense

The Plaintiffs have failed to state a claim upon which relief can be granted.

Wherefore, Defendants pray that the Plaintiff's Complaint be dismissed and the Defendants have their costs.

Duke W. Dunbar, Attorney General; Frank E. Hickey, Deputy Attorney General; James D. McKevitt, Assistant Attorney General; By James D. McKevitt, Assistant Attorney General.

Defendant's Address: 1210 Sherman Street, Denver, Colorado 80203.

[fol. 30] Certificate of Mailing (omitted in printing).

[fol. 31]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

[Title omitted]

MOTION FOR REHEARING—Filed April 7, 1964

The American National Red Cross and The United States of America, by their undersigned attorneys, hereby move for rehearing of defendants' motions to (1) dismiss the claims of The United States of America and (2) strike paragraph "12" of the complaint, for the following reasons:

1. The striking of paragraph "12" and the dismissal of the United States are inconsistent with the denial of defendants' motion for summary judgment, and contrary to the Tenth Circuit's holding in *United States and Phillips Petroleum Company* v. *Bureau of Revenue*, 291 F. 2d 677. Here, as there:

> The action pleaded • • • is essentially • • • to assert the constitutional immunity of the United States from taxation by the state. The United States is the proper party to prosecute an action to protect its sovereign rights [citing *United States* v. *Allegheny County*, 322 U.S. 174, 191]. It is the real party in interest. If immunity from the state tax exists, it is in behalf of the United States. The exaction of the tax can only be resisted on such ground by the Government or one who stands in its shoes. If the taxpayer has any right to assert the Government's immunity, it is a 'derivative one.' (291 F. 2d 677, 678-9)

Thus, unless and until this Court holds that Red Cross is not a federal instrumentality, dismissal of the United States for failure to state a claim on which relief may be granted is premature. The Court, by denying defendants' motion for summary judgment, necessarily reserved deci-

[File endorsement omitted]

sion on Red Cross' status until the trial. It should also, therefore, have denied defendants' motion to dismiss as against the United States and, thereby, likewise reserved until trial decision on whether the Government has stated a claim upon which relief may be granted.

[fol. 32] Or, differently stated, paragraph "6" of the complaint, which alleges that Red Cross is a tax immune federal instrumentality, must, for purposes of defendants' motion to dismiss, be accepted as true; particularly since this Court, in denying defendants' motion for summary judgment, has refused to hold that Red Cross is not such an instrumentality as a matter of law. And clearly, under *Phillips* and *Allegheny County, supra,* the United States may sue to avoid infringement of the sovereign immunity from state taxation which it and its instrumentalities enjoy.

2. Since dismissal of the United States is premature, so is the striking of paragraph "12" of the complaint, which is relevant and material because it makes clear that the nature of the Government's claim is such as to afford jurisdiction here under 28 U.S.C. 1331 as well as under 28 U.S.C. 1345.

3. Plaintiffs are anxious to avoid the delay and burden on the Court and the parties that would be entailed by a direct appeal to the Supreme Court at this stage of the proceedings. However, there appears to be some doubt as to whether the United States may, without prejudice to its rights, await the final judgment before appealing from the order entered herein on March 16, 1964.

4. That doubt and any thought of need for an appeal to the Supreme Court before trial would be removed if this Court entertains this motion for rehearing and either (a) postpones its decision on rehearing until after the trial or (b) prior to trial, modifies its order of March 16, 1964, so as to substitute for the present provisions which strike paragraph "12" of the complaint and dismiss the United States, new provisions which deny defendants' mo-

tions to strike and to dismiss the United States on the ground that it has failed to state a claim upon which relief can be granted.

Wherefore, it is respectfully prayed that an order entertaining this motion for rehearing be entered forthwith; and that on rehearing, which may await the trial, the order of March 16, 1964, be modified so as to substitute for the [fol. 33] present provisions striking paragraph "12" of the complaint and dismissing the United States, new provisions denying defendants' motions to strike and to dismiss the United States.

Jack D. Henderson, Attorney for Plaintiff, The American National Red Cross.

Lawrence M. Henry, United States Attorney.

William Massar, Attorney, Tax Division, United States Department of Justice.

[fol. 40]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

[Title omitted]

PRE-TRIAL ORDER—July 31, 1964

1. Date and Appearances

Pre-Trial Conference held July 28, 1964.

Appearances: Jack D. Henderson for plaintiff The American National Red Cross; John L. Currin, of counsel, for plaintiff The American National Red Cross; William Massar for The United States of America and of counsel for plaintiff The American National Red Cross; James D. McKevitt, Assistant Attorney General, for defendants.

[File endorsement omitted]

2. Jurisdiction

The Court finds that it has jurisdiction over the parties and the subject matter.

3. Amendments to Pleadings: None.

4. Preliminary Motions Remaining to Be Determined

The motion for rehearing of defendants' motions to (a) dismiss the claim of the United States of America, and (b) strike paragraph "12" of the complaint, shall be disposed of, without further argument, oral or written, simultaneously with the disposition by the Court of all other issues after trial. It is the understanding of the parties and the Judge presiding at the pre-trial conference that the time to appeal from the disposition of defendants' said motions will not begin to run until the disposition of the motion for rehearing.

[fol. 41] 5. (A) General Nature of the Claims of the Parties

(a) Plaintiff's claim:

This is an action for (1) a declaration that application of the Colorado Employment Security Act (Colorado Revised Statutes 1953, as amended, Chapter 82) to plaintiff The American National Red Cross is unconstitutional, (2) an injunction enjoining its application to Red Cross, and (3) the recovery of payments thereunder which Red Cross has made involuntarily and under protest. Entitlement to the relief requested is predicated on the ground that Red Cross, as an instrumentality of the United States, is immune under the Federal Constitution from the application of the Colorado Employment Security Act and that Congress has not waived that immunity.

(b) Defendants claim:

Defendants contend that Red Cross is not an instrumentality of the United States and that, in any event, Congress has by the 1960 amendments to the Federal Unemployment

Tax Act waived whatever immunity Red Cross had with respect to the application of the Colorado Employment Security Act under the Federal Constitution.

(B) Uncontroverted Facts

1. Plaintiff The American National Red Cross (hereinafter sometimes referred to as "Red Cross") is organized and exists by virtue of an act of the Congress of the United States of America (Title 36 USC Sec. 1 et seq.) which provides that it is a body corporate and politic in the District of Columbia. Red Cross does not have its principal place of business in the State of Colorado.

2. The United States of America is a corporate sovereign and body politic.

[fol. 42] 3. Defendant Department of Employment (hereinafter sometimes referred to as "Department") is an agency of the State of Colorado, charged with the function of administering the Employment Security Act of the State of Colorado (Colorado Revised Statutes 1953, as amended, Chapter 82) hereinafter referred to as the "Act".

4. Defendant Bernard E. Teets is the Executive Director of Employment and as such is head of the Department.

5. The Department determined that employment in Colorado was subject to the Act and demanded that payment by Red Cross and certain of its chapters be made of the contributions and interest provided for by the Act.

6. Thereafter and prior to the commencement of this action, payments aggregating more than $10,000 were made involuntarily and under protest to defendants. Part of said payments was forwarded from the office of The American National Red Cross in Washington, D.C. and parts were forwarded from the offices of various Red Cross chapters located in Colorado. The parts forwarded by any one such office did not aggregate $10,000.

7. Each of said payments was accompanied by an application for refund, each of which was denied by defendants prior to the commencement of this action.

8. The American National Red Cross is a charitable organization described in 26 USC Section 501(c)(3) and exempt from United States Income Tax under Title 26 USC Section 501(a).

9. Defendants claim that if Red Cross does not make payments which they claim continue to become due under [fol. 43] the Act, Red Cross will be subject to the penalties, interest charges and remedies for collection of contributions, interest and penalties provided for by the Act.

10. Colorado Law does not provide for interest with respect to refunded contributions under the Act.

6. Issues of Fact and Law

The contested issues are:

1. Whether Red Cross and its chapters are instrumentality or instrumentalities or agency or agencies of the United States.

2. Whether Congress by the 1960 amendments to the Federal Unemployment Tax Act has waived Red Cross' constitutional immunity from the application of the Colorado Employment Security Act.

3. Whether the chapters in Colorado of The American National Red Cross are each juridical entities separate and apart from each other and from plaintiff, The American National Red Cross.

4. Whether plaintiff is precluded from obtaining relief in this Court because it has not brought suit in the District Court for the City and County of Denver as provided for in Section 82-9-9 of the Act.

5. Whether Red Cross is entitled to interest on any refunds which may be granted by this Court.

7. Witnesses

(a) In the absence of 30 days notice to opposing counsel to the contrary, plaintiff will call, or will have available at the trial:

[fol. 44] 1. Philip Schenkenberg, Area Manager, Midwestern Area, The American National Red Cross, St. Louis, Missouri.

2. An officer or employee of the United States Department of Defense who is familiar with the duties and activities of Red Cross in providing assistance to the military establishment and relief and welfare services to the armed forces.

3. An officer or employee of the United States State Department familiar with the duties and activities of the United States under the Treaties of Geneva or the Treaties of the Red Cross, and the duties and activities of Red Cross in relation thereto and in relation to other international matters.

4. An officer or employee of the Executive Office of the President, Office of Emergency Planning, who is familiar with the duties and activities of the United States in relation to disaster relief and the duties and activities of the Red Cross in connection therewith.

(b) In the absence of 30 days notice to opposing counsel to the contrary, defendant will call, or will have available at the trial, Joseph F. Lipersick, Job Insurance Chief, Colorado Department of Employment, 1210 Sherman Street, Denver, Colorado, or his successor in office.

Additional witnesses may be called by any party provided a notice setting forth the names and addresses of the witnesses and a brief resume of the substance of their testimony is filed with the Clerk of the Court and a copy of the notice is furnished to opposing counsel at least fifteen days prior to trial.

[fol. 45] 8. Exhibits

Defendants waive certification and authentication of copies of any documents listed in the attached list of 61 items, or which were offered as exhibits on the deposition of Philip Schenkenberg, which plaintiff may wish to offer in evidence, but reserve the right to object to the admissibility of any such documents on other evidentiary grounds.

Copies of any additional exhibits which any party may wish to offer in evidence shall be filed with the Clerk of the Court and furnished to opposing counsel at least fifteen days before trial.

9. Discovery

Defendants' counsel shall be furnished, not later than August 22, 1964, with the names and addresses of the witnesses, or their alternates, referred to in 7 (a) (2) (3) and (4) supra. All discovery proceedings shall be completed by November 1, 1964.

10. Miscellaneous Orders

None

11. Modifications—Interpretation

Hereafter, this Order will control the course of the trial and may not be amended except by consent of the parties and the Court or by order of the Court to prevent manifest injustice. The pleadings will be deemed merged herein. In the event of ambiguity in any provision of this Order, reference may be made to the records of this conference to the extent reported by stenographic notes, and to the pleadings.

[fol. 46] 12. Trial and Estimated Time

Trial before a three judge court is estimated to take approximately one and a half days.

Done in Open Court on July 31, 1964.

By the Court:

Alfred A. Arraj, Judge.

Approved:

Jack D. Henderson, Attorney for Plaintiff The American National Red Cross.

Lawrence M. Henry, United States Attorney.

William Massar, Attorney, Tax Division, United States Department of Justice.

Duke W. Dunbar, Attorney General; Frank E. Hickey, Deputy Attorney General; James D. McKevitt, Assistant Attorney General, By James D. McKevitt, Assistant Attorney General.

[fol. 52]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 8233

THE AMERICAN NATIONAL RED CROSS, Plaintiff,

vs.

DEPARTMENT OF EMPLOYMENT, and BERNARD E. TEETS, Executive Director of Employment of the Department of Employment, Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW—
September 8, 1965

The plaintiff appeared by William Massar, Esquire, of the Department of Justice, Washington, D. C., John L. Currin, Esquire, of the General Counsellor's Office of The American National Red Cross, Washington, D. C., and

Jack D. Henderson, Esquire, First National Bank Building, Denver, Colorado; the defendants appeared by James D. McKevitt, Esquire, Assistant Attorney General, Denver, Colorado.

This matter came on for trial to this District Court of three judges on June 30, 1965. The Court heard the evidence and argument of counsel and is now duly advised.

This is an action by the United States and The American National Red Cross, hereinafter referred to as "Red Cross", against the Department of Employment of the State of Colorado and its Executive Director, hereinafter referred to as the "Department".

The action seeks to have the Colorado Employment Security Act, Chapter 82 Colorado Revised Statutes 1953, [fol. 53] declared inapplicable to the Red Cross and seeks a refund of all sums collected under the Act from the Red Cross.

Briefly stated the contentions of the parties are as follows.

Plaintiffs contend that Red Cross is an instrumentality of the United States, and as such is immune from taxation by Colorado, and Congress has not waived that immunity.

Defendants contend that the Red Cross is not an instrumentality of the United States and in any event, Congress has, by the 1960 amendments to the Federal Unemployment Tax Act, waived whatever immunity Red Cross had with respect to the application of the Colorado Employment Security Act.

The issues as set forth in the pre-trial order are as follows:

1. Whether Red Cross and its chapters are instrumentality or instrumentalities or agency or agencies of the United States.

2. Whether Congress by the 1960 amendments to the Federal Unemployment Tax Act has waived Red Cross' constitutional immunity from the application of the Colorado Employment Security Act.

3. Whether the chapters in Colorado of The American National Red Cross are each juridical entities separate and apart from each other and from plaintiff, The American National Red Cross.

4. Whether plaintiff is precluded from obtaining relief in this Court because it has not brought suit in the District Court for the City and County of Denver [fol. 54] as provided for in Section 82-9-9 of the Act.

5. Whether Red Cross is entitled to interest on any refunds which may be granted by this Court.

There is little dispute as to the facts. The pre-trial order contains the following statement of uncontroverted facts:

1. Plaintiff The American National Red Cross (hereinafter sometimes referred to as "Red Cross") is organized and exists by virtue of an act of the Congress of the United States of America (Title 36 USC Sec. 1 et seq.) which provides that it is a body corporate and politic in the District of Columbia. Red Cross does not have its principal place of business in the State of Colorado.

2. The United States of America is a corporate sovereign and body politic.

3. Defendant Department of Employment (hereinafter sometimes referred to as "Department") is an agency of the State of Colorado, charged with the function of administering the Employment Security Act of the State of Colorado (Colorado Revised Statutes 1953, as amended, Chapter 82) hereinafter referred to as the "Act".

4. Defendant Bernard E. Teets is the Executive Director of Employment and as such is head of the Department.

5. The Department determined that employment in Colorado was subject to the Act and demanded that payment by Red Cross and certain of its chapters [fol. 55] be made of the contributions and interest provided for by the Act.

6. Thereafter and prior to the commencement of this action, payments aggregating more than $10,000 were made involuntarily and under protest to defendants. Part of said payments was forwarded from the office of The American National Red Cross in Washington, D.C. and parts were forwarded from the offices of various Red Cross chapters located in Colorado. The parts forwarded by any one such office did not aggregate $10,000.

7. Each of said payments was accompanied by an application for refund, each of which was denied by defendants prior to the commencement of this action.

8. The American National Red Cross is a charitable organization described in 26 USC Section 501(c)(3) and exempt from United States Income Tax under Title 26 USC Section 501(a).

9. Defendants claim that if Red Cross does not make payments which they claim continue to become due under the Act, Red Cross will be subject to the penalties, interest charges and remedies for collection of contributions, interest and penalties provided for by the Act.

10. Colorado Law does not provide for interest with respect to refunded contributions under the Act.

In addition, it was admitted by the defendants at the trial that the local chapters of the Red Cross have no legal entity apart from the plaintiff, The American National Red [fol. 56] Cross.

The Court incorporates in its findings of fact the foregoing uncontroverted facts and admission, and in addition thereto finds the following facts.

The Red Cross' charter designates it as the organization authorized to act in matters of relief under the Treaties of Geneva and to perform all duties devolved upon a national society by each nation which has acceded to any of said treaties or conventions.

In addition, it is authorized to act in matters of voluntary relief and as a medium of communication between the people of the United States and their armed forces.

By the provisions of Title 10 United States Code, § 2602, the President may accept the cooperation and assistance of the Red Cross and employ it under the armed forces under regulations to be prescribed by the Secretary of Defense, and pursuant to this statute the President has so utilized the Red Cross.

The Red Cross is the authorized agency for communication with prisoners of war held by unfriendly governments.

In addition to these services performed for and on behalf of the United States Government, the Red Cross is also authorized to and does carry on a system of national and international relief in time of peace and apply the same in mitigating the sufferings caused by pestilence, fire, famine, floods, and other great national calamities, and devise and carry on measures for preventing the same.

[fol. 57] Conclusions of Law

The Court concludes it has jurisdiction of the subject matter of this action and of the parties thereto.

The Court concludes that the local chapters of The American National Red Cross are not separate legal entities but are integral parts of the plaintiff The American National Red Cross.

The Court concludes that The American National Red Cross is an instrumentality of the United States, and as such is immune from taxation under the Colorado Employment Security Act, unless that immunity has been waived by the 1960 amendments to the Federal Unemployment Tax Act.

The Court concludes that the United States of America has a legal interest in this litigation and is a proper party plaintiff to this action.

The Court concludes that the 1960 amendments to the Federal Unemployment Tax Act do not waive the immunity of the Red Cross from taxation under the Colorado Employment Security Act.

The reasons for the Court's conclusions in the latter respect are as follows:

The Federal Unemployment Tax Act (Chapter 23 of Title 26 U.S.C.) imposes a federal tax upon employment to provide a fund for unemployment compensation. However, the act recognizes the right of the states to provide and administer a fund for the same purpose under state law, and the contributions made by employers to the state [fol. 58] fund are by the federal act made a credit against the federal tax (see §§ 3301 and 3302).

Although instrumentalities of the United States have a constitutional immunity from state taxation, § 3305(b) of the Federal Unemployment Tax Act waived that immunity as to some instrumentalities of the United States. Prior to the 1960 amendments to the Federal Unemployment Tax Act, § 3305(b) read in its essential parts as follows:

> "The legislature of any State may require any instrumentality of the United States (except such as are (1) wholly owned by the United States, or (2) exempt from the tax imposed by section 3301 by virtue of any other provision of law) . . ., to make contributions to an unemployment fund under a State unemployment compensation law . . .".

The Red Cross came within the provisions of the second exemption, being an instrumentality of the United States which was exempt from the tax imposed by § 3301 by virtue of § 3306(c) (8), which exempted from the taxes imposed by § 3301 service performed in the employ of a corporation organized and operated for charitable purposes.

However, by the 1960 amendments to the Federal Unemployment Tax Act, § 3305(b) was amended to read in its essential parts as follows:

> "The legislature of any State may require any instrumentality of the United States (other than an instrumentality to which section 3306(c) (6) applies . . . to make contributions to an unemployment fund under a State unemployment compensation law . . .".

In other words, the Congress did not waive the immunity from state taxes of instrumentalities of the United States to which § 3306(c) (6) applies.

§ 3306(c) (6), as amended by the 1960 amendments, "ap-
[fol. 59] plies" to an instrumentality of the United States which is

> "exempt from the tax imposed by section 3301 by virtue of any provision of law which *specifically refers to such section* . . .". (Emphasis added.)

Subdivision (8) of § 3306(c), as amended by the 1960 amendments, is a "provision of law" which exempts from the tax imposed by § 3301

> "service performed in the employ of a religious, charitable, educational, or other organization described in section 501(c) (3) which is exempt from income tax under section 501(a)".

Admittedly The American National Red Cross is such an exempt organization. There remains then only the question of whether or not subdivision (8) of § 3306(c) as amended in 1960 "specifically refers to" § 3301.

§ 3301 imposes a tax on employment. § 3306(c) (8) provides that the employment described in subdivision (8) is not employment for the purposes of the Federal Unemployment Tax Act. This is only another way of saying that the employment described in § 3306(c) (8) is exempt from the taxes imposed by § 3301.

The Court concludes that § 3306(c) (8) "specifically refers to" § 3301 and that the Red Cross is exempt not only from the taxes under the Federal Unemployment Tax Act but also is immune from taxation under the Colorado Employment Security Act.

That it was the intent of the Congress that the 1960 amendments should not subject the Red Cross to either State or Federal unemployment taxes is evident from the following quotation from the legislative history found at page 12797 of Volume 106, No. 115 of the Congressional [fol. 60] Record of Proceedings and Debates of the 86th Congress, Second Session, held on June 22, 1960, wherein Congressman Ikard, in clarification of the purposes of the 1960 amendments here under consideration, stated:

> "The American National Red Cross has for many purposes been regarded as an instrumentality of the Federal Government. However, its exemption from Federal unemployment taxes is presently based on that provision of the statute which specifically exempts service performed in the employ of certain charitable corporations from such taxes. H.R. 12580 continues the exemption from unemployment taxes for such charitable corporations; hence the bill is not intended to remove the Red Cross' current exemption. Similarly, it is not the intention of the bill to remove the present exemption of Red Cross employment from State unemployment taxation."

The Court concludes that the Red Cross is not precluded from obtaining relief in this court because it has not brought suit in the District Court for the City and County of Denver as provided in § 82-9-9, Colorado Revised Statutes 1953.

The Court concludes that the Red Cross is entitled to judgment against the defendants for the amounts which it and its various chapters have paid to the State of Colorado under the Colorado Employment Security Act, but the Red Cross is not entitled to recover any interest thereon.

It Is Ordered that this matter is continued for 10 days from this date for the filing of a stipulation of the parties as to the amount for which judgment should be entered. Upon the filing of the stipulation, the Clerk of the Court shall forthwith enter judgment in favor of The American National Red Cross and against the defendants in the amount stipulated.

[fol. 61] Dated at Denver, Colorado, this 8th day of September, 1965.

By the Court:

Oliver Seth, United States Circuit Judge;

Alfred A. Arraj, United States District Judge;

Hatfield Chilson, United States District Judge.

[fol. 62]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 8233

THE AMERICAN NATIONAL RED CROSS, Plaintiff,

vs.

DEPARTMENT OF EMPLOYMENT, and BERNARD E. TEETS, Executive Director of Employment of the Department of Employment, Defendants.

SUPPLEMENTAL CONCLUSIONS OF LAW AND JUDGMENT—
Filed September 16, 1965

It having been called to the Court's attention that the conclusions of law entered by the Court on September 8, 1965, concluded that The American National Red Cross was entitled to a judgment against the defendants for the amounts which it and its various chapters have paid to

the State of Colorado under the Colorado Employment Security Act, but the Court made no determination as to the prayer for injunctive relief.

The Court therefore makes the following supplemental conclusions of law, to-wit:

The Court concludes that the Red Cross is entitled to a permanent injunction enjoining the defendants and their officers, agents, servants, employees, and attorneys from assessing or collecting any contributions, interest, or penalties under the Employment Security Act of the State of Colorado, Chapter 82 of the Colorado Revised Statutes 1953, as amended, against or from the plaintiff, The American National Red Cross.

It Is Therefore Ordered, Adjudged and Decreed that the [fol. 63] defendants, Department of Employment and Bernard E. Teets, Executive Director of Employment of the Department of Employment, and their officers, agents, servants, employees, and attorneys are permanently enjoined from assessing or collecting any contributions, interest, or penalties against or from the plaintiff, The American National Red Cross, under the Employment Security Act of the State of Colorado, Chapter 82 of the Colorado Revised Statutes 1953, as amended.

It Is Further Ordered, Adjudged and Decreed that the plaintiff, The American National Red Cross, have judgment against the defendants in the sum of $27,927.79 and the plaintiff's costs to be taxed by the Clerk of the Court.

Dated at Denver, Colorado, this 15th day of September, 1965.

By the Court:

Oliver Seth, United States Circuit Judge;

Alfred A. Arraj, United States District Judge;

Hatfield Chilson, United States District Judge.

[fol. 64]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 8233

[Title omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed November 15, 1965

I. Notice is hereby given that the Department of Employment and Bernard E. Teets, Executive Director of Employment of the Department of Employment, the defendants above-named, hereby appeal to the Supreme Court of the United States from the final order of this Court granting a permanent injunction and entering a judgment against the defendants in accordance with the complaint of the plaintiff, entered in this action on September 15, 1965.

This appeal is taken pursuant to 28 U.S.C. Sec. 1253.

II. The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. Complaint of the American National Red Cross and the United States of America, filed October 7, 1963.

2. Defendants Motion to Strike and Dismiss and Memorandum in support thereof, which were filed on October 28, 1963, and November 6, 1963.

[fol. 65] 3. Plaintiff's Motion for Summary Judgment and Affidavit in support thereof, filed November 21, 1963.

4. Plaintiff's Memorandum in support of their Motion for Summary Judgment, filed December 9, 1963.

5. Defendants' Memorandum Brief in opposition to Plaintiff's Motion for Summary Judgment, filed December 24, 1963.

6. Plaintiffs' Reply Brief, filed January 10, 1964.
7. Courts Order on Motions dated March 4, 1964.
8. Defendants' Answer filed March 26, 1964.
9. Defendants' Pre-Trial Statement, filed July 28, 1964.
10. Plaintiffs' Pre-Trial Statement, filed July 29, 1964.
11. Pre-Trial Order dated July 31, 1964, and filed July 31, 1964.
12. Transcript of Testimony of Proceedings including closing legal arguments of Plaintiffs' and Defendants' counsel.
13. Courts Findings of Facts and Conclusions of Law, filed September 8, 1965 and dated September 8, 1965.
14. Courts Supplemental Conclusions of Law and Judgment dated September 15, 1965 and filed September 16, 1965.

III. The following questions are presented by this appeal:

I.

Whether the Plaintiff, American National Red Cross and its Chapters are instrumentalities and agencies of the United States Government.

II.

Whether the United States Congress by its 1960 Amendments to the Federal Unemployment Tax Act (Title 26, U.S.C.; Section 3305) has waived the constitutional immunity of the Plaintiff American National Red Cross from the application of the Colorado Employment Security Act, Chapter 82, 1963, Colorado Revised Statutes.

[fol. 66]

III.

Whether the Plaintiff, American National Red Cross is precluded from obtaining relief in this Court because it

failed to bring suit in the District Court of the City and County of Denver, State of Colorado, as provided for in Section 82-9-9, of the Colorado Employment Security Act, 1963, Colorado Revised Statutes and therefore, whether this Court had jurisdiction over the subject matter or the Defendants to this action.

IV.

Whether the United States of America is a real party in interest to this action and should have been dismissed as a party plaintiff to this action.

V.

Whether this Court had jurisdiction over the Defendants Department of Employment and Bernard E. Teets, Executive Director of Employment of the Department of Employment.

Duke W. Dunbar, Attorney General; Frank E. Hickey, Deputy Attorney General; James D. McKevitt, Assistant Attorney General, By James D. McKevitt, Assistant Attorney General, 1210 Sherman Street, Denver, Colorado 80202, 222-1551.

[fol. 67] Proof of Service (omitted in printing).

[fol. 118]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action 8233

THE AMERICAN NATIONAL RED CROSS, Plaintiff,

v.

DEPARTMENT OF EMPLOYMENT, and BERNARD E. TEETS, Executive Director of Employment of the Department of Employment, Defendants.

OFFICIAL TRANSCRIPT OF TESTIMONY OF JANUARY 7, 1966

Proceedings before the Honorable Oliver Seth, United States Circuit Judge, presiding, the Honorable Alfred A. Arraj, United States District Judge, and the Honorable Hatfield Chilson, United States District Judge, beginning at 9:00 o'clock a.m., on the 30th day of June, 1965, in Courtroom A, Main Post Office Building, Denver, Colorado.

APPEARANCES:

For the Plaintiff: William Massar, Department of Justice, Washington, D. C., John L. Currin, General Counsellor's Office of The American National Red Cross, Washington, D. C., and Jack D. Henderson, Attorney at Law, Denver, Colorado.

For the Defendants: James D. McKevitt, Assistant Attorney General, Denver, Colorado.

[fol. 120] Proceedings

The Court: Are the parties ready in 8233?

Mr. Massar: Yes, Your Honor.

Mr. McKevitt: Yes, Your Honor.
The Court: We will proceed.

OPENING STATEMENT OF MR. MASSAR

Mr. Massar: As Your Honors will recall, this is an action by the Red Cross and the United States for judgment declaring that the Colorado Unemployment Security Tax is unconstitutional in its application to the Red Cross and for an injunction enjoining the application of the Act to the Red Cross and for refund of such contributions under the Act as have to the time of judgment been paid to the defendants by the Red Cross.

The issues that remain in the case as appears from the pretrial order are these:

Whether the Red Cross and its chapters are instrumentalities or agencies of the United States;

And, whether Congress by the 1960 amendments to the Federal Unemployment Tax Act has waived Red Cross' constitutional immunity from the application of the Colorado Employment Security Act;

Whether the chapters in Colorado of the American National Red Cross are each juridical entities separate and apart from each other and from plaintiff, the American National Red Cross.

[fol. 121] In addition to those issues, the pretrial order also reserves the issue of whether plaintiffs are precluded from obtaining relief because suit was not previously brought in the District Court for the City and County of Denver in accordance with the procedure outlined in the Colorado Employment Security Act, and the ultimate question, if there be recovery by the Red Cross whether it is entitled to interest on the payments that have been made.

When the parties were previously before the Court, it was urged that fundamentally the issues involved here are

pure questions of law, and it was argued that perhaps this Court dispose of the issues without a trial.

This Court has ruled that there should be a trial and the plaintiffs are now prepared to offer evidence through witnesses and through documents to support their contention that the American National Red Cross is an instrumentality of the United States and as such immune from the application of the Colorado Unemployment Security Act.

The live evidence, the evidence through witnesses, will focus on the statutory and treaty obligations imposed upon the Red Cross, which in turn it will be urged are what clearly makes the American National Red Cross an instrumentality of the Government rather than an ordinary charitable organization.

Reference will also be made to other statutes, statutes [fol. 122] other than those with which the witnesses will be concerned in their testimony.

The Court will be asked to receive in evidence and take judicial notice of the various rulings, proclamations and other material which will show what the legislative branch and the executive branch of the United States as well as the various states have concluded as to the status of the American National Red Cross, both with respect to its immunity from taxation and its immunity from other regulatory measures by the various states.

I would like to proceed by calling the first witness, Mr. Raymund Yingling.

Mr. McKevitt: I would like to make an opening statement, if I could, Your Honor.

The Court: Yes.

OPENING STATEMENT OF MR. MCKEVITT

Mr. McKevitt: If Your Honor please, counsel has expressed the issues as set forth in the pretrial order, and with these issues counsel for the defense has no objection.

These are basically the issues, and I would like to elaborate on them further.

First of all, this action arises because of two statutes in question, namely Chapter 82 of the Colorado Revised Statutes, 1963, the Colorado Unemployment Security Act, and then the Federal Employment Tax Act, commencing in Title 26, Section 3301.

[fol. 123] As Your Honors are well aware, from past arguments, the issue has arisen from the efforts by the State of Colorado to subject the American National Red Cross to coverage under the Colorado Employment Security Act.

Basically, our position will be this, Your Honors, that the Federal Government does two things. One, it requires minimum standards of those who will be covered as subject employers throughout the United States, and, in addition thereto, it also allows the states to make additional coverages of employers which the Federal Government may not cover themselves.

We submit, by the 1960 amendments, the Government has allowed the State of Colorado as well as the State of Alaska and State of Hawaii, who cover nonprofit organizations, to tax organizations such as American National Red Cross.

This is, Your Honors, a test case, Hawaii deciding it is exempt and Alaska and Colorado deciding it is subject to the acts, and this being selected as the jurisdiction to decide the status and the exemption, if any.

We submit the issues are, one, whether or not they are an instrumentality, which we deny. Our second contention is whether or not, if the Court finds that they are an instrumentality or agency of the United States Government, if the Congress and United States has allowed the State of Colorado to still tax the American National Red Cross, [fol. 124] which we submit they have in the alternative.

Another important question is the question of chapters throughout the State of Colorado, as to whether or not they are separate legal entities or whether they are all

one and in fact they are all part of one entity of the American National Red Cross headquartered in the District of Columbia.

It would be our position, having reviewed the charter and by-laws of the National Red Cross as well as their modus operandi, that they are one entity, and in the event this Court finds the American National Red Cross is subject to the Colorado Employment Security Act, that in that event all employees within all chapters within the State of Colorado are covered under the Colorado Employment Security Act. In other words, it would not be chapters having four or more employees, because it would be a matter of all the chapters since the chapters would be one entity, and for such reason we submit this to the Court as well.

Mr. Henderson has asked me to make certain agreements and stipulations, one of which is in the event the Court were to find that the American National Red Cross were entitled to a refund of taxes paid that the figure would be left open subject to a computation by the Colorado Department of Employment, and we will gladly cooperate and agree to furnish that at the time in question.

[fol. 125] The last, in the event the Court finds it is entitled to a refund, is it also entitled to an interest thereon?

This we deny.

The next issue I would like to raise at this time, because I think it is important. Previously, this action was brought in the name of the United States of America and American National Red Cross. Subsequent thereto, there were various motions to dismiss and strike submitted by the defendants and a motion for summary judgment submitted by the plaintiff. As Your Honors are aware, you made an order dismissing the United States.

Previously the appearances made were by Jack Henderson and in the name of the United States Government by Mr. William Massar. We wish to make an inquiry

at this time and also object to an appearance as to the U.S. Department of Justice as a general appearance.

We would inquire, first of all, if their appearance if that of general appearance or amicus curiae so that we may submit further argument on the role of amicus curiae, and, secondly, whether or not they are entitled in the first place, because it is obvious we have a plaintiff and the sole plaintiff has private and public counsel before this Court.

We know this is within the discretion of the Court, but we do raise the inquiry and would object to the appearance of Mr. Massar as the general counsel or in making a general [fol. 126] appearance on behalf of the American National Red Cross.

The Court: The Court, for the purpose of this hearing and at least until the motion for rehearing is disposed of, will consider the United States to be a party.

The matter I think was discussed at the pretrial and there was a reference made to a time for appeal by the United States, and it is my understanding that the intention was to carry the United States as a party until the motion for rehearing was disposed of, and I think procedurally it would be a little clearer if we consider them as a party here in the course of this hearing.

Mr. McKevitt: Thank you, Your Honor.

The Court: Now, counsel, as I understand you, referring to the pretrial order, on page 4, this Section 6, the issue remaining as subsection 3 is disposed of, that that is no longer a contested issue by reason of your statement.

Would you agree on that, counsel, that they are, all chapters of American Red Cross are one entity, or—

Mr. Massar: That has been our position throughout the case and we do not contend otherwise at this time.

The Court: That's no longer a contested issue, is that correct?

Mr. McKevitt: Yes, I would like one more clarification. That is, regardless of the number of employees, each chapter is one part of one legal entity, namely the Ameri- [fol. 127] can National Red Cross.

Mr. Massar: I would say yes.

Mr. McKevitt: Then that issue has been resolved, Your Honor.

The Court: All right, thank you. You may proceed with your first witness, counsel.

Mr. Massar: Call Mr. Yingling.

Raymund Thomas Yingling called as a witness by the plaintiffs, being first duly sworn, on his oath testified as follows:

Direct examination.

By Mr. Massar:

Q. Would you please state your full name and address.

A. Raymund Thomas Yingling, 3040 Idaho Avenue, Washington, D.C.

Q. What degrees do you hold and from what institutions?

A. I hold an A.B. from Western Maryland College, Maryland, and an LL.B. from Georgetown University Law School.

Q. And of what bars are you a member?

A. I am a member of the D.C. bar and of the Supreme Court bar.

Q. Could I ask you to please raise your voice a bit? Counsel may have some difficulty, because I am having—

A. All right, if you can't hear me—

Q. What is your occupation?

[fol. 128] A. I am employed by the State Department. My title there is Assistant Legal Advisor.

Q. What are the nature of your duties in that capacity?

A. I have responsibility for legal questions relating to a number of functional problems, among which are the Geneva Conventions of 1949.

Q. Would you briefly state what the Geneva Conventions of 1949 are?

A. Well, these are four conventions, that is treaties between governments, which as the date indicates were negotiated at Geneva in 1949 in a diplomatic conference which represented the most of the then states of the world, I think 50 some states present at that time.

These conventions have as their general purpose the protection of victims of war. The first relates to the amelioration of wounded and sick in armed forces in the field; second, amelioration of wounded and sick and shipwrecked of armed forces at sea; third, prisoners of war; and, fourth, the protection of civilians at wartime.

Q. Have you represented anyone at these?

A. Yes, I was the vice chairman of the delegation that negotiated these four conventions in 1949.

Q. Did you take part in the United States' positions for the 1949 conference?

A. Yes, I represented the State Department on an [fol. 129] interdepartmental committee which prepared the U.S. positions. I don't recall all the departments that were on that. The Department of Defense, of course, State Department, the Department of Justice, American Red Cross.

Q. Have you written on the subject of the Geneva Conventions in 1949?

A. Yes, I collaborated on an article on these conventions, which was published sometime after the 1949 conference.

Q. How long have you been with the Department of State altogether?

A. Forty some odd years.

Q. And how long have you been handling problems related to the Geneva Conventions?

A. Since 1948.

Q. Were you present at the signing of what is commonly referred to as the First Geneva Convention of 1949?

A. Well, I was not only present, I signed it.

Q. Has that convention been ratified by the United States and is it now a valid and existing treaty to which the United States is a party?

A. It is.

Q. Is the First Geneva Convention of 1949 published in Volume 6 of the United States Treaties and Other International Agreements, at page 3114 and following?

A. It is published in that series, and I think that's [fol. 130] the page.

Mr. Massar: I now ask the Court to take judicial notice of the First Geneva Convention of 1949, the publication of the United States Treaties and Other International Agreements, as made evidence of the treaties under the Act of September 23, 1950, Chapter 1001, Section 2, as appears in 64 Statutes at Large 939 and 979, and in Title 1, United States Code, Section 112(a).

Mr. McKevitt: What was the Title, counsel?

Mr. Massar: Title of the Code?

Mr. McKevitt: Right.

Mr. Massar: 1, United States Code, Section 112(a). That's the section of the Code which makes the United States Treaties and Other International Agreements evidence of the treaties themselves.

Q. Mr. Yingling, is the instrument which I now hand you a true and correct copy of the First Geneva Convention of 1949?

A. Yes, it is.

Mr. Massar: I would like at this time to hand up three copies of the First Geneva Convention, a copy of which has already been furnished counsel for the State, so that the Court may have them for their convenience.

The Court: I think it will clarify these if the Clerk will number them in some way. I realize they are not strictly exhibits.

[fol. 131] Mr. Massar: Fine, shall we make any differentiation in the numbering as between exhibits in evidence?

The Court: No, it won't be necessary.

(Plaintiffs' Exhibit 1 was marked for identification.)

By Mr. Massar:

Q. Mr. Yingling, what does Article 24 of the First Geneva Convention provide?

A. That article brings under the protection of the Convention the medical personnel and chaplains of the armed services.

Q. What is the effect of Article 26 of the First Geneva Convention of 1949?

A. Article 26 extends the same protection to personnel of National Red Cross Societies or other voluntary aid organizations which are authorized and accepted by governments to assist them in caring for the sick and wounded in accordance with the terms of the Convention.

Q. Was it contemplated by the United States delegation when Article 26 was agreed upon that a voluntary society would be recognized and authorized by our government to render assistance to the regular medical service of our armed forces?

A. It was.

Q. Did the United States delegation have any particular society in mind?

A. It did.

Q. Has Congress recognized and authorized any society? [fol. 132] A. Well, the society which we had in mind was the American National Red Cross.

Q. And has Congress recognized and authorized any society since then to render assistance to the regular medical service of the armed forces of the United States?

Mr. McKevitt: I will object. I think this calls for a conclusion beyond the testimony he is giving to the particular treaty itself. Also, the record would speak for itself.

The Court: I think the statutory reference is sufficient on that point, counsel.

Mr. Massar: I would ask the Court to take judicial notice at this time of an act to incorporate the American National Red Cross, approved January 5, 1905, which appears in Volume 33, Statutes at Large of the United States of

America, at pages 599 and following, and further to take judicial notice of that act as now amended, which consists of Sections 1 through 9 of Chapter 1 of Title 36 of the United States Code, 1958 Edition.

And at this time, I would like to read from that act, which in Section 3, provides:

"The purposes of this corporation are, and it shall be, to furnish volunteer aid to the sick and wounded of armed forces in time of war, in accordance with the spirit and conditions of the Conference of Geneva of October, 1863, [fol. 133] and also the Treaties of the Red Cross or the Treaties of Geneva of August 22nd, 1864 and July 27th, 1929."

The Court: Counsel, we will take notice of the statute and we will read it, so you can proceed with your witness, if you would.

Mr. Massar: I take it that it will be unnecessary for counsel to reserve any exceptions to any rulings of the Court?

The Court: Yes.

By Mr. Massar:

Q. Mr. Yingling, why do you conclude that the—I will withdraw that question. Mr. Yingling, in your opinion, has the American National Red Cross, or does the American National Red Cross constitute an instrumentality by which the United States discharges its obligations under Article 26 of the First Geneva Convention of 1949?

Mr. McKevitt: Objection, Your Honor. I object on the grounds this is a conclusion to be drawn by the Court and a legal question per se.

The Court: I think it is basically a fact question. The objection will be overruled. He is not asking a legal question. Proceed.

A. Counsel, would you please repeat just the last part of the question?

By Mr. Massar:

Q. Would you state whether, in your opinion, the American National Red Cross is an instrumentality of the United [fol. 134] States by which it discharges its treaty obligations under Article 26 of the First Geneva Convention of 1949.

A. It is my opinion that it is.

Q. Would you state why it is your opinion.

A. Well, the statute clearly indicates, in my view, both in what is said in the Preamble and in Section 3, which states the primary purpose of creating this organization and reincorporating it in 1905 was to care for the sick and wounded of armed forces under these Conventions to which the United States was a party and to do all of the things which a national Red Cross society was authorized to do under those Conventions.

Mr. McKevitt: Now, Your Honor, I would like to move once again to strike the question and also the answer, inasmuch as the opinion of the witness has been based upon a statute and statute only, from which I think this is a conclusion to be drawn by the Court.

The Court: That may very well be, but the objection is overruled.

By Mr. Massar:

Q. Are there any other provisions of Chapter 1 of Title 36, which in your judgment support the conclusion that the American National Red Cross is an instrumentality through which the United States has chosen to discharge its treaty obligations under the First Geneva Convention of 1949?

[fol. 135] A. Well, in the Preamble of the 1905 Act, which reincorporated the Society, it was indicated the purpose was to put this Society—which the Congress considered so important that it ought to be under Government supervision—to put it under Government supervision, and not only is the purpose of Section 3 as I have already indi-

cated, but Section 5 makes the Government a participant in this organization by authorizing the President to name any of the 50 Board of Governors, and one of these must be the Chairman of the organization and seven others must represent different Federal departments and agencies.

Also, in Section 6, I think it is, of the same Act, Congress provided that the Society must make an annual report to the Secretary of Defense, which would contain its receipts and disbursements, among other things, which the Secretary of Defense would audit, and then the Secretary of Defense would pass this report on to the Congress.

It seems to me all these things indicate that Congress had in mind using this organization, setting up this organization and using it, to carry out duties and obligations which are placed on parties to the Geneva Convention of 1949, the first treaty convention.

Mr. McKevitt: For the record, I would submit the same objection and move this answer be stricken on the ground previously tendered to the Court.

[fol. 136] The Court: Overruled, proceed.

By Mr. Massar:

Q. In your opinion, Mr. Yingling, do Sections 13 and 15 of Title 36, which provide for the use by the American National Red Cross of land and buildings belonging to the Government for their national headquarters in Washington, support your conclusion that the American National Red Cross is an instrumentality of the Government, by which it has chosen to discharge its treaty obligations under the First Geneva Convention of 1949?

A. I think this supports the other conclusions I have reached.

Mr. McKevitt: For the record, I would move the answer and question be stricken on the ground previously tendered.

The Court: Overruled.

By Mr. Massar:

Q. Are you familiar with Public Law 131 of the 83rd Congress, First Session, which appears in Title 10, Section 2602, of the United States Code, 1964 Edition, and which deals with the tender—

A. Yes, that statute authorizes the Secretary of Defense to—I mean, authorizes the Chairman of the American National Red Cross to tender the services of the organization to the Department of Defense, and I think in 1951 the then Chairman, Harriman, did tender them and they were accepted by President Eisenhower in 1953.

[fol. 137] Mr. Massar: I now ask the Court to take judicial notice of Public Law 131, 83rd Congress, First Session, which appears in Volume 57, Statutes at Large, at page 178, and which also appears in Section 2602 of Title 10 of the United States Code, 1964 Edition, and I offer in evidence at this time a copy of the letter dated July 17, 1953, from Roland D. Harriman, Chairman of the American National Red Cross, to the President of the United States.

The Court: Is this the letter that is referred to in the pretrial list?

Mr. Massar: Yes.

Mr. McKevitt: So far as authenticity is concerned, Your Honor.

The Court: Yes.

Mr. McKevitt: I have objection on other grounds.

The Court: What is the basis of your objection?

Mr. McKevitt: I would like to cite these authorities to the Court, Your Honor.

My first objection would be based on the ground the document is hearsay. The party is not here to be examined so far as statements are concerned.

My next objection is that this is addressed to a third party and has no relation to correspondence between the parties to this action.

My next objection would be based on the fact that the [fol. 138] document is unsigned.

For these authorities, I would like to cite the following cases—

The Court: Well, the fact it is unsigned, isn't that covered by your authenticity agreement?

Mr. McKevitt: All right, Your Honor, I will withdraw that.

My other two objections would be on the basis of hearsay and the fact that this party is not here for cross-examination and the third party rule, and I would like to cite cases to the Court on that.

One case I would cite is Gilbert vs. Gulf Oil Corporation, Court of Appeals of Virginia, 175 Fed. 2nd 705, wherein this report discusses several questions, one as to opinions and conclusions, one as to the question of the fact that the document without the right of cross-examination was questionable as to its entry.

Another case I would like to cite is Bella Steamship Company vs. Insurance Company of North America, Court of Appeals, Maryland, a case cited in 5 Fed. 2nd 570. It held that the document was inadmissible where it was addressed to a third person with whom the adverse party was in no wise connected.

Those are the authorities which I would submit at this time, Your Honor.

[fol. 139] The Court: What is the purpose of the offer, counsel?

Mr. Massar: The purpose of the offer is to establish that the President of the United States has accepted the tender of cooperation and assistance provided for by Section 2602 of Title 10, and I believe the document is admissible in evidence on the ground that it is an official document.

This is addressed to the President of the United States and now reposes in the Archives of the United States, and the authenticity of the document, proof of authenticity of the document, has been waived by the State.

On this ground, I submit that the document is relevant and admissible in evidence.

Mr. McKevitt: May I make one more statement to the Court, Your Honor?

The Court: Yes, surely.

Mr. McKevitt: In light of counsel's statement and justification for admissibility, I would like to object on the ground this is irrelevant because what he is stating now is here is a case where the American Red Cross has tendered its services and where the United States Government has accepted services.

The statute has already provided the tender and acceptance may be made, and this is just supplemental to [fol. 140] that and has no bearing on the matter.

The Court: It will be received in evidence.

(Plaintiffs' Exhibit 2 for identification was received in evidence.)

Mr. Massar: I now offer in evidence a copy of a letter dated August 17, 1953, from President Dwight D. Eisenhower, to Mr. Harriman, Chairman of the American National Red Cross.

The Court: Were these identified by numbers somewhere, counsel, for the record?

Mr. Massar: This will be Exhibit 3 in evidence.

The Court: What is the purpose of this letter?

Mr. Massar: To show the acceptance by the President of the United States of the tender by the American National Red Cross.

Mr. McKevitt: I would make the same objection and incorporate the authorities I have previously cited to the Court.

The Court: All right, thank you.

Mr. Massar: I would hand these copies up.

The Court: This Exhibit 3 will be admitted. Proceed.

(Plaintiffs' Exihibt 3 for identification was received in evidence.)

Mr. Massar: If the Court would find it convenient to [fol. 141] have these copies of Exhibits 2 and 3, I would hand them up at this time for that purpose.

The Court: Very well.

By Mr. Massar:

Q. Mr. Yingling, has the Congress of the United States recognized or authorized any voluntary society other than the American National Red Cross to render assistance to the regular medical service of our armed forces as contemplated by Article 26 of the First Geneva Convention of 1949?

Mr. McKevitt: Objection, on the ground I made on the other objections.

I think this is once again where counsel is asking the witness to comment on acts of Congress, which I think stand on their face as to what the provisions there are.

The Court: He is asking him whether an act exists. I think his question is proper.

A. No, there is no other society designated by Congress.

By Mr. Massar:

Q. Mr. Yingling, assuming that the notification required by Article 26 of the First Geneva Convention of 1949 has been given, would American National Red Cross personnel engaged in time of actual war with a foreign power in nursing or welfare activities in military hospitals or medical units be entitled in your opinion to the protection provided for by the First Geneva Convention of 1949?

[fol. 142] A. They would.

Q. In the same circumstances, would your answer be the same with respect to American National Red Cross personnel engaged, first, in nonmedical administrative activity in military medical facilities, and, secondly, in driving ambulances, searching for, collecting and transporting wounded and sick military personnel?

Mr. McKevitt: I'm going to object and ask the last question and answer be stricken, the previous question and answer and the last question, because now he is asking once again as to the contents of the Geneva Treaty part of the statutes, which speak for themselves.

The Court: Counsel, I think you are using the witness to present a legal argument, basically it's what you are doing.

The witness is qualified to interpret, I suppose, the purpose of the Geneva Conventions and their application, but if you could be a little more specific in your questions and if you would avoid any questions that are purely legal questions—you are just encumbering the record with legal argument for the most part.

This witness is an expert in his field, and if you would limit your questions to that scope, we will take judicial knowledge of all the statutes and all you will need to do is refer us to them and that will be sufficient. We will [fol. 143] interpret the statutes as best we can.

You may answer this question, but if you will be guided by that, it will be sufficient.

Would you read the question?

(The reporter read the pending question aloud.)

A. My answer would be the same.

By Mr. Massar:

Q. My last question of the witness, and I hope it comes within the Court's admonition, in carrying out these activities, Mr. Yingling, would the American National Red Cross be discharging obligations assumed by the United States under the convention?

A. Yes.

Mr. Massar: That's all.

Mr. McKevitt: Counsel, do you want to leave your papers up there?

Mr. Massar: They are not confidential, but I will give you some room.

Mr. McKevitt: Whatever is your pleasure.

Mr. Massar: I am sorry, I should have been more thoughtful.

Cross examination.

By Mr. McKevitt:

Q. Mr. Yingling, you say you are an Assistant Legal Advisor for the Department of State, United States Government?

A. That's correct.

[fol. 144] Q. How many are there?

A. I don't know exactly, but maybe an odd dozen.

Q. Pardon?

A. Maybe an odd dozen. I don't know exactly.

Q. Didn't you tell me yesterday there were approximately 64?

A. No, I told you the number fluctuates. There are about 65 lawyers in the Legal Advisor's office. I didn't tell you there were that many assistants.

Q. You have a particular specialty within the Department of State, do you not?

A. A particular specialty?

Q. Yes.

A. No, I have more than one legal subject for which I am responsible.

Q. All right, how many are there?

A. Well, I handle law of the sea questions. That's one. I handle sovereign immunity legal problems. I handle the Geneva Conventions of 1949. I handle some questions that relate to treaty exemption of persons from selective service. Those are the principal things that I handle.

Q. It is primarily limited to that scope?

A. I say those are the principal things.

Q. Is your activity as far as the Red Cross is concerned

limited to their use or their function under the Geneva Treaty?

[fol. 145] A. I wouldn't say that it is limited. My functions are not spelled out with any such precision as that. I would say that any question that involved the Red Cross that came to the Department, on which legal advice was needed, might be referred to me. Primarily, the legal questions relate, of course, to the Geneva Conventions and their interpretation.

Q. Well, let's go from your past experience. From past experience, has it not been limited, so far as your operation of the Red Cross is concerned, to the Geneva Treaty?

A. Largely, my Red Cross work has been a negotiation and interpretation of these conventions, yes.

Q. Any other work?

A. Well, counsellor, I am trying to be helpful, but I can't confine myself to saying I have never handled anything else related to the Red Cross than these things. I may have.

Q. None you can remember at the present time?

A. That's right.

Q. Is your position appointive or Civil Service or what?

A. Well, I have Civil Service status, because I was promoted into my present position from a classified Civil Service status. I understand I took that with me. I have never had to test that.

Q. Is it not correct that the—strike that. You are familiar also with the International Red Cross, are you [fol. 146] not, Mr. Yingling?

A. I don't know what you mean by that. You mean the International Committee of the Red Cross or the whole International Red Cross world?

Q. Would you be kind enough to explain both to the Court?

A. Yes, the International Red Cross world is composed of three sections.

Number one is the—not necessarily in this order—is the International Committee of the Red Cross, which sits in Geneva and is a private corporation under Swiss law, composed entirely of Swiss citizens, and it has the same humanitarian aims as all of the Red Cross world.

The second is the League of Red Cross Societies, which is a coordinating body in relief work and does relief work itself.

The third are these national societies, such as the American National Red Cross, which are found in countries which are parties to the Geneva Conventions of 1949 and prior conventions.

Q. Now, what are these national societies called when they are grouped together?

A. These national societies?

Q. If you refer to them as one body, what would you call them?

[fol. 147] A. You mean the whole Red Cross world?

Q. The various national societies.

A. The various national societies, so far as I am aware, are not grouped together.

Q. Is it not correct they have certain obligations they must conform to before they are or may be considered as a body of the International Red Cross?

A. Yes, the International Red Cross Conference, which is the governing body of the Red Cross world and normally meets about once every four years, is composed of delegates from national societies, the International Committee, the League and from governments which are parties to the Geneva Conventions, and this International Conference is the governing body of the Red Cross world and they have laid down some criteria for national Red Cross societies.

Q. Is it not correct one of these is as follows: "Be an institution whose autonomous status allows it to operate in conformity with the fundamental principles of the Red Cross as formulated by the International Red Cross Conference"?

A. Yes.

Q. Is that provision still in effect?

A. Yes, I think so.

Q. And it was so adopted by the International Red Cross Conference in 1948, was it not, Mr. Yingling?

A. I don't recall when it—specifically when it was [fol. 148] adopted, but it is still in force. I think it was approved by the last conference, which was the 19th. I may be wrong.

Q. Is it not correct that the formation of these various National Red Cross societies was for basically humanitarian purposes so far as the functions of the Geneva Treaties is concerned?

A. The whole purpose of the Geneva Treaties is humanitarian.

Q. So far as humanitarian purposes, one was to take care of soldiers wounded in the war?

A. That's one of the purposes.

Q. Is it not correct these societies were obligated or expected to give medical aid to soldiers who were wounded regardless of their alignment with any particular army or alliance?

A. Well, the convention so provides their function is to care for sick and wounded of armed forces in the field without regard to race or nationality or sex or what. I mean, they find sick and wounded people. Their function is the humanitarian function of taking care of them. That's the purpose they were set up for and the purpose for which the Geneva Conventions were entered into.

Q. Take, for example, a hypothetical example, in World War II, is it not correct, if the treaty were in effect at that time the American National Red Cross could take care of, [fol. 149] and would be expected to, German soldiers who were not yet prisoners but who were wounded?

A. If they found them on the battlefield, certainly. That's one of the purposes, to take care of them, gather them up and send them to hospitals and do whatever they can to ameliorate their condition.

Q. Is it also not correct that these various national societies were banded for an international humanitarian purpose rather than a national goal?

A. It is a humanitarian purpose. Yes. I mean, there is no distinction, I take it, about humanitarian principles on national grounds.

Q. That's what I say. I say it is not limited to national grounds. It is the international scope.

A. I will be glad to try to answer your question. I don't quite get the thrust of it. The conventions have as their purpose the taking care of victims of war, and the national societies have been set up by governments to assist the governments in carrying out those functions, those duties in fact and obligations under the conventions, and those duties and obligations are all humanitarian. These conventions have no other purpose.

Q. But the purposes are not national in scope. They are for world humanitarianism, isn't that correct?

A. As I say, I don't think of humanitarianism on [fol. 150] national grounds. When you speak of national grounds, I usually think of politics or national interests. These are interests of humanity and there is no difference in the care a sick and wounded man can get, no matter what country he belongs to or where he is from.

Q. You say you wrote a previous article on the Geneva Treaty?

A. Yes.

Q. Where is that located?

A. It is in the American Journal of the International Law. I am sorry, I can't give you an exact reference to it.

Q. You don't know the date of publication?

A. No.

Q. Do you have any idea?

A. I suspect it is several years after 1949, but I wouldn't know the exact year.

Q. Is it your opinion that the American National Red Cross is an agency of the United States Government?

A. It is.

Q. It is an agency and an instrumentality both then?

A. Well, counsel will have to define those terms, if he is going to make a distinction between them.

Q. Are you able to distinguish between them?

A. I might be able if I knew the context in which they were used. When I say an instrumentality or agency, it is [fol. 151] a corporation that is set up to assist the Government and assists the Government. You can put any terminology on that you wish. I am not using this in any technical or statutory sense.

Q. You are not referring to Title 26, United States Code, for example, or Title 10 or any other statutes, in other words?

A. You will have to be a little more exact in the reference to those titles.

Q. Are you referring to Title 26, relating to the Federal Unemployment Tax Act?

A. No, I am not. I said, I am not referring to these terms as used in any statutes.

Q. You are not referring, either, are you, to the Federal Disaster Act, Title 42?

A. No.

Q. Now, your opinion, you say, is based upon the wording of the statutes?

A. That they are an instrumentality?

Q. Right.

A. Yes, it is based on what is stated to be the purpose of the reincorporation of the society in the 1905 Act and the context in which that was made. The Preamble indicates what the Congress is trying to do in passing that act reincorporating the society.

Q. One of the prime reasons for forming your opinion, [fol. 152] is it not, is that the charter enables the President of the United States to appoint eight members to the Board of Governors, seven of which have a voting right?

A. No, my purpose in forming this opinion is to see

what this society is supposed to do, whether it is one of the societies that were referred to in the convention, in the First Geneva Convention. It is a national Red Cross society. They are so described in the convention.

Q. You recall your conversation with me yesterday afternoon, do you not?

A. Yes.

Q. Is it not correct that you told me that one of the reasons your opinion was so founded was on the fact that the President had a right to appoint seven voting members to the Board of Governors?

A. That this is an instrumentality?

Q. Right.

A. Not solely on that.

Q. No, I said, this is one of the reasons you gave.

A. Yes, I think this is all part of the picture. The whole 1905 statute, which reincorporated the society because the Congress thought its work was so important that it ought to be under Government supervision, all indicate what Congress was trying to do and whether it was trying to set up something to assist the Federal Government in [fol. 153] carrying out its obligations under the treaties.

Q. Now, you mentioned under the supervision of Congress. Is it under the supervision of the Congress?

A. Did I say under the supervision of Congress?

Q. Is the American National Red Cross under the supervision of Congress?

A. Wait a minute, let's get back to what I said. I thought I said under the supervision of the Government.

Q. I think you did. My apologies.

A. It is under the supervision of Congress only to the extent that the act provides that the annual report which it is required to make to the Secretary of Defense must be forwarded to the Congress.

Q. So far as the services are concerned under the Geneva Treaty, they are all done on a voluntary basis, are they not? There is a tender and an acceptance, a tender by

the American National Red Cross and an acceptance by the President of the United States?

A. That is not correct, yes.

Q. Pardon?

A. That is not correct. Under the convention, the Government has a right to ask the society to perform these functions and authorize them to perform these functions, and Congress set up the society to perform these functions.

Q. Does Congress not provide there would be a tender [fol. 154] and acceptance?

A. In my opinion, not in this part of the statute.

Q. What statute?

A. The 1905 Act. The Section 3 states the first purpose, as the primary purpose, of setting up the society and re-incorporating it was to assist in aiding the sick and wounded of the armed forces in the field in time of war.

Q. Well, Mr. Yingling, is there any way that the United States Government could force the American National Red Cross to tender its services if it did not offer same as required under the Geneva Treaty?

A. I think that if the Red Cross were authorized to perform these functions, and I can't understand—I mean, the practicality of this question—but, anyway, if the Red Cross were authorized to perform these functions in World War II, let's say, and did not perform them or refused to perform them, in my opinion they would be acting contrary to the intent of Congress in 1905 in setting up this corporation.

Q. Assuming they never offered to give the services, could they be forced to give the services?

A. As a practical matter, I think, yes. I don't know that that question has ever been raised or questioned.

Q. There is no provision for it in the treaties at this time?

[fol. 155] A. There is no provision for forcing them that I know of, no.

Mr. McKevitt: Thank you, Mr. Yingling.

Mr. Massar: I have no further questions of this witness.

Mr. McKevitt: I have no objection to the permanent excusal of Mr. Yingling. He is appearing from Washington, D.C., and if he has to catch an early plane I would have no objection to his departure at this time, Your Honor.

The Court: Thank you. He may be excused.

We will take a short recess.

(The Court recessed from 10:05 o'clock a.m. until 10:20 o'clock a.m.)

Mr. Massar: Mr. Jackson.

STEPHEN S. JACKSON called as a witness by the plaintiffs, being first duly sworn, on his oath testified as follows:

Direct examination.

By Mr. Massar:

Q. What is your full name?

A. Stephen S. Jackson.

Q. And your address?

A. 1400 South Joyce Street, Arlington, Virginia.

Q. What degrees do you hold and from what institutions?

A. I hold an A.B. degree from Holy Cross College, an [fol. 156] LL.B. degree from Harvard Law School, and an Honorary Doctorate degree of Laws from Catholic University of America.

Q. Of what bars are you a member?

A. I am a member of the New York State Bar, United States District Court for the Southern District of New York.

Q. Where are you presently employed and in what capacity?

A. I am employed in the Defense Department in the capacity of Special Assistant to the Assistant Secretary of Defense for Manpower.

Q. How long have you held that position?

A. This particular position I have held for three years.

Q. And what do the duties entail?

A. Well, my duties are prescribed by the Assistant Secretary of Defense, having to do with several areas concerning manpower and personnel. I have specific assignments as well as a responsibility to accept any assignment that the Secretary may require of me, the Assistant Secretary. I am referred to as the Senior Advisor.

Prior to my present assignment, I was the Deputy Assistant Secretary of Defense for Manpower. At the present time, our office is broken down into several areas, with eight deputies, and I am Special Assistant and where in any of those areas the Assistant Secretary wants my services [fol. 157] he will call upon me, whether it crosses any of these lines or not.

Q. And have the Department's relations with the Red Cross been delegated to you as a matter for your concern?

A. The Secretary of Defense has issued a directive covering this matter and ordered that the implementing action of the services be submitted to the Office of Assistant Secretary of Defense for Manpower. One of the special assignments I have under the Assistant Secretary of Defense for Manpower is to advise him or represent him in dealings with the National American Red Cross.

Q. And when you referred to implementation, were you referring to implementation of Public Law 131 of the 83rd Congress, First Session, which appears in Title 10, Section 2602, United States Code, of which the Court took judicial notice during Mr. Yingling's testimony?

A. That's right.

Q. You are familiar with that law, are you?

A. I am.

Q. Are you familiar with the tender and acceptance of assistance and cooperation under that law by Chairman Harriman of the Red Cross and President Eisenhower?

A. I am familiar with the documents referred to in the testimony given, yes.

Q. Have regulations contemplated by Section 2602 of [fol. 158] Title 10 been prescribed?

A. They have.

Q. I hand you four documents which have been marked for identification as Plaintiffs' Exhibits 4, 5, 6 and 7, and ask you whether these documents are true and correct copies of the implementing regulations which have been promulgated, to which you referred in answer to my last question?

A. They are.

Mr. Massar: I offer these documents in evidence, copies of which have been furnished to the State's counsel, and three copies of each of which I have here available for the Court's convenience.

The Court: Any objection?

Mr. McKevitt: May I have a second to read the documents, Your Honor?

The Court: Yes.

(Counsel perused documents.)

Mr. McKevitt: I would like to voir dire the witness.

Mr. Jackson, referring to Plaintiffs' Exhibits 4, 5, 6 and 7, which have been marked for identification purposes only, do you say you have personal knowledge of all the wording of these regulations?

The Witness: I didn't say all the wording, no, sir. I said I am familiar with them. There may be minutia to which [fol. 159] I couldn't swear to as my present knowledge.

Mr. McKevitt: Well, do you have personal knowledge as to whether or not these were the actual publications of various armed forces which are reflected on these exhibits?

The Witness: I have knowledge that they are issued in accordance with the original directive as prescribed by the Secretary. I didn't see them issued personally.

The Court: Counsel, were these within the pretrial order?

Mr. McKevitt: No, these have been submitted subsequent to the pretrial order, Your Honor. There is no stipulation as to authenticity as to these particular documents.

The Court: Don't they show on the face the authentication? You perhaps are not familiar—

Mr. McKevitt: No, I haven't seen yours, excuse me. If I may approach the bench, Your Honor?

(Documents were handed to counsel.)

The Court: Take your time. Go back and read them, if you like.

Mr. McKevitt: Thank you, Your Honor.

(Counsel perused documents.)

Mr. McKevitt: Your Honor, having reviewed the original documents and the certifications thereon, I have no further voir dire of the witness, and I have no objection as [fol. 160] to their admissibility.

If I may approach the bench, I will tender them back to the Court.

(Counsel handed documents to the Court.)

The Court: They will be admitted in evidence.

(Plaintiffs' Exhibits 4, 5, 6 and 7 were admitted in evidence.)

By Mr. Massar:

Q. Would you describe in summary form the logistical support which the armed services are authorized and directed to furnish the American National Red Cross under Section 2602 of Title 10 of the United States Code and the directives and regulations issued thereunder which have just been received in evidence as Exhibits 4, 5, 6 and 7?

The Court: Excuse me, counsel. The first part of the question is proper, but I don't believe it would be necessary for him to summarize the contents in answer to the first part of the question. The second part is not a proper question.

Would you read the first part?

The Reporter: "Would you describe in summary form the logistical support which the armed services are authorized and directed to furnish the American National Red Cross under Section 2602 of Title 10 of the United States Code and the directives and regulations issued thereunder which have just been received in evidence as Exhibits 4, 5, 6 and 7?"

[fol. 161] The Court: We don't want a summary of the regulations. If he will answer the first part of the question, it will be satisfactory.

By Mr. Massar:

Q. Would you confine yourself to what logistical support the armed services are authorized and directed to furnish the American National Red Cross under Section 2602?

A. Well, there are about a dozen of them listed and prescribed in the regulations. They deal with transportation of certain Red Cross personnel. They deal with transportation of their household effects. They deal with privileges with respect to the use of commissaries, PX's and other privileges that are accorded civilian employees of the Department of Defense. They deal with the housing or quartering of the Red Cross officials or representatives that I referred to.

They require or they are concerned with certain particular privileges extended to the Red Cross in the field by way of opportunity to purchase clothing and uniforms and the same as generally issued to the members of the armed forces. They apply also to providing for temporary wear, I would say, as the gear aboard ship.

And then there are other logistical supports prescribed that do not apply specifically to the people, transportation of articles necessary for the Red Cross in carrying out its commitments, storage and warehouse facilities for them, [fol. 162] provides for office space on a base for Red Cross, custodial provisions, provisions under certain restrictions, and generally these are the type of logistical support that

are described pursuant to the requirement of the law and the subsequent developments in implementing the law.

Q. Would you describe in the same summary the services which the Red Cross furnishes to the military establishments?

A. The services that they perform are again very numerous, and they cover the whole gamut of what I might refer to as social services and humane services to the members of the armed forces and to their dependents or relatives.

They particularly serve the patients in hospitals in many ways of providing visits and other services to alleviate the situation of the patients.

They provide also some services which are of particular assistance to the armed forces in carrying out their mission. These are services which are rendered only by the National American Red Cross. For instance, the regulations provide that where there is a patient in the hospital, perhaps overseas or far distant, and there is a request by the military surgeon for supplemental information concerning the patient and it is requested of the Field Director, I believe, to carry it out, this information or this request is flashed out to the local community where the military man came from and is provided in the investigation of a Red Cross [fol. 163] representative and is speedily transmitted back to the physician.

This is done when requested by the attending physician, military physician, and by the patient, if competent. This indicates that it may be more commonly used for a diagnosis, for instance, of some apparent or semblance of a mental condition, or, let us say, where a man claims he was shellshocked it would have to do with the determination perhaps of whether it was malingering or genuine, and if it does involve any kind of possible psychosis whether it is organic or whether it is functional, and the family background of the patient is important with respect to aiding the physician, the military physician, in his diagnosis, and this service is rendered by the National American Red Cross.

Q. Is that service rendered by any establishment within the military itself?

A. No.

Q. Is it rendered for the military by any establishment other than the American National Red Cross?

A. This is the prescribed channel for this communication, and this communication is provided by the Red Cross. Whether at any time there might be an isolated instance where some other one may have contributed, I don't know of any.

Q. Are there any other services rendered to the military establishments by the American National Red Cross which [fol. 164] involves communication and reporting which are not ordinarily rendered by any establishment within the military or any other establishments other than American National Red Cross outside of the military?

A. Yes, and this is perhaps in terms of volume the larger service which I consider to be uniquely, at least from a practical standpoint, available from the Red Cross only, and these are reports having to do with situations that might require compassionate action by the military authorities.

It might be that a member on a far distant assignment learns in a letter or otherwise that his wife is critically ill and he asks for compassionate leave. The commanding officer asks the field director to secure this information. It is flashed out on the local chapter. The information is carefully gleaned by the representative and sent back to the commanding officer, who makes the decision. This has to do with a wider gamut, but that's one example.

As of the end of the first quarter of March, there were an average of 2,400 such communications a day, and I would venture an opinion from the copies of correspondence that have come over even my desk that with the situation in Viet Nam that 2,400 is larger today. This is a service which is very vital to the operation of the armed forces and is provided to the degree that I have indicated.

[fol. 165] And, finally, there is another service which is prescribed by these regulations having to do with commanding officers who are authorized court-martial jurisdiction involving a dishonorable discharge or a bad conduct discharge, and where the military person has been found guilty, upon request, he asks for the Red Cross to provide him with the family background of the defendant now found guilty of a serious offense, which involves in a sense a life sentence if he has a dishonorable discharge. For the rest of his life, he has this disgrace hanging over him and the difficulties of adjusting to society and employment, and the Red Cross sends back the data upon which, before sentence is made, the judge can temper justice with mercy, can evaluate the type of sentence to be made.

This, of course, is, as Your Honor well knows and all of you, a common practice through our civil courts on a probation staff. I suppose I read hundreds of them myself when I was on the bench and they were extremely important as to yes or no, where to place a child, for instance, but the commanding officer has no probation officer and he must rely on this important function of the National Red Cross organization.

Q. In your opinion, could the armed services operate properly and efficiently without the services of communicating and reporting in aid of medical diagnosis and treat-
[fol. 166] ment and in making compassion reassignments or discharges or in connection with sentencing, which you have testified are services rendered only by the American National Red Cross through the military services?

A. Well, I think really the thrust of your question is proficiently and effectively I suppose I couldn't deny the fact or wouldn't swear to the fact that it would be theoretically possible to increase the armed forces to train certain individuals for this type of investigation, to take on people who have these skills, and say to the Red Cross, "We don't need you any more."

Quite aside from the expense that would be involved, quite aside from the question of securing appropriations

from Congress to pay for the personnel, I think that the job would not be done as efficiently or effectively. I can't see how they could track the thousands of volunteers that supplement and work under the direction and guidance of trained personnel in the Red Cross, and I hope that's a responsive answer to your question.

Q. Well, I understand you to say that though it is conceivable that the military services—

Mr. McKevitt: Now, I object, Your Honor. Counsel is testifying rather than interrogating.

The Court: Yes, counsel, you don't need to summarize his testimony.

[fol. 167] By Mr. Massar:

Q. Is it your answer that these services must be performed by some agency for the military to operate efficiently and effectively?

A. I would say yes.

Q. Whether that service be within the military or whether it be an adjunct to the military?

A. Well, I have indicated within the military the limitations and difficulties involved.

Q. Is there any statute comparable to Section 2602 of Title 10 which deals with the relationship between the armed forces and any other organization other than the American National Red Cross?

Mr. McKevitt: I am going to object once again on the grounds that these are statutes. If there are some, counsel can bring them out to the Court, and it is for the Court's own conclusion and review to determine if they are.

The Court: That's probably so, but he can answer. He is in the area.

Mr. Massar: I believe his special competence—

The Court: Whether any other statutes exist, I suppose.

The Witness: I may answer?

The Court: Yes.

A. No.

By Mr. Massar:

Q. Do you know how many Red Cross personnel are [fol. 168] presently assigned to serve the armed forces and at how many different military locations they are stationed?

A. If my memory serves me properly, a figure of around 1,728. I have some notes here, but they haven't been admitted in evidence, so I haven't referred to them, and it seems to me that the—I think, if I may say so, counsel, this paper would be admitted in evidence and I could refer to it.

Q. Have you received recently a report from the American National Red Cross as to the number of Red Cross personnel assigned to serve the military and military establishments?

A. I did.

Q. And I show you a letter dated June 16, 1965, addressed to you, by the Assistant Counsellor of the American Red Cross, and ask you whether that's the report to which you refer?

A. It is.

Q. Do you wish to refresh your recollection as to the number of personnel now assigned to military establishments from that report?

Mr. McKevitt: We will object, Your Honor. That's not a proper qualification, I don't believe, for past recollection recorded, because this is a report from somebody else. [fol. 169] The recording was not made by the witness.

The document itself is hearsay because the party who has tendered it has not testified as yet and so far is not present in the court to testify, and, therefore, it is not a proper document to give him a past recollection recorded.

The Court: It is a letter from the American Red Cross?

Mr. Massar: It is.

The Court: I don't believe you have offered it in evidence either.

Mr. Massar: I will offer it in evidence, if counsel wants it. I was hoping to keep the record free of unnecessary

encumbrances, but I will be happy to offer it if counsel insists.

Mr. McKevitt: I would like to voir dire the witness.

This document that you received, was it received from John L. Currin, an Assistant Counsellor for the American National Red Cross?

The Witness: It was given to me by a member of the Red Cross. I don't know what his name was at this time.

Mr. McKevitt: Well, is the signature of John L. Currin reflected thereon as having addressed the document to you?

The Witness: I am not competent to pass on his signature.

[fol. 170] Mr. McKevitt: Is his named typed in there?

The Witness: His name is typed in there, that's correct.

Mr. McKevitt: And there is a signature above it, is that correct?

The Witness: There is a signature above it. Both "John L. Currin".

Mr. McKevitt: Is Mr. Currin present in the courtroom?

The Witness: I don't know Mr. Currin. At least, by name.

Mr. McKevitt: Pardon?

The Witness: I don't know Mr. Currin by name.

Mr. McKevitt: You would base your testimony as to questions just posed to you by counsel on the basis of this document which has been submitted to you, is that correct?

The Witness: I based it on the entire document, yes.

The Court: Counsel, your objection to the letter is sustained. There is no proper basis for the letter.

Mr. McKevitt: Pardon?

The Court: Your objection is sustained. There is no proper basis for the letter, and the witness has already testified as to his recollection.

Proceed, counsel.

By Mr. Massar:

Q. Will you refresh your recollection?

[fol. 171] The Court: He has already testified, counsel. Go ahead.

Mr. Massar: Did you want a copy of this for your files?

Mr. McKevitt: Yes, please, thank you.

By Mr. Massar:

Q. Do you recall at how many locations the Red Cross personnel are dispersed throughout the world?

A. Are you referring to the number of Red Cross professionally trained people?

Q. Assigned to military establishments.

A. As I pointed out, I would need to refresh my recollection, both as to the number and both as to where they are assigned. This is information on the letter which we were discussing here.

Q. Would you refresh your recollection, please, and testify as to that?

The Court: He can't do that, counsel. He either has a recollection or he can refresh it from something that he was instrumental in preparing. If he has an independent recollection, he can testify to it.

Do you know, approximately? I think the question was how many installations at which there are present Red Cross personnel, if I understood it correctly, throughout the world. Do you know, approximately?

The Witness: Your Honor, these figures that I referred [fol. 172] to as the number as well as where they are dispersed is contained in the letter that's in dispute. The information was verified by the Department of the Army, which is a part of the Department of the Defense, and I accepted that as authentic.

The Court: Do you have any recollection? Can you answer the question of counsel, if I understood the question, how many locations—

Mr. Massar: Approximately how many locations.

The Court: Throughout the world there are at present Red Cross personnel?

A. I will do the best I can. 240 odd—44, I believe—in the continental United States, and I just can't swear to the accuracy of this, I believe it is something around 75 overseas.

By Mr. Massar:

Q. Does this represent the totality of Red Cross personnel engaged in servicing the armed forces?

A. It has no reference at all, of course, to the thousands of volunteers that implement the services.

Q. And by those, you refer to the personnel at the various chapters throughout the country?

Mr. McKevitt: I object. The question is leading, Your Honor.

The Court: Yes.

By Mr. Massar:

Q. To whom do you refer by the term volunteers?

[fol. 173] A. Well, the myriad of services that they render, the Gray Ladies, the transportation, the driving back and forth, the services they render in the hospitals and where blood is given, and, of course, those that are assigned to chapters throughout the United States and overseas.

Mr. Massar: I have no futher questions of the witness.

Mr. McKevitt: Thank you, counsel.

Cross examination.

By Mr. McKevitt:

Q. You refer to these eight areas that are covered by Manpower, is that correct, Mr. Jackson?

A. Yes, the eight deputies.

Q. How many undersecretaries do you have?

A. Deputy secretaries?

Q. Deputy secretaries.

A. These are deputies to the Assistant Secretary, Mr. Ball, that you are referring to?

Q. How many assistant secretaries do you have?

A. Assistant secretaries to the—

Q. Secretary of Defense.

A. Secretary of Defense?

Q. Right.

A. I am not sure now, but there is R and D, Research [fol. 174] and Development, Finances, of course, Installations and Logistics, Procurement, the Assistant Secretary for Administration. The General Counsel has the rank of Assistant Secretary, but he doesn't go by that title. Those I think are the assistant secretaries to the Secretary of Defense.

Q. All right, and then you are a Special Assistant to the particular Assistant Secretary for Manpower?

A. That's right.

Q. How long have you been employed by the Department of Defense, sir?

A. I came to the Department of Defense in October of 1950.

Q. And you have been there ever since?

A. Yes.

Q. You mentioned your previous experience on the bench. In what capacity was that, sir?

A. Well, I was a Justice of Domestic Relations Court in the City of New York from '34 to 1944.

Q. Your testimony previously given regarding the efficiency and the economic aspects of failure to use the Red Cross and use military forces instead, Mr. Jackson, referring to this testimony, this is true because of the fact that you don't pay the Red Cross any money to use this service, do you?

A. We do not pay out cash money.

[fol. 175] Q. You give them supplies to distribute, do you not?

A. That's true.

Q. Naturally day follows night, it would be more expensive for you to set up a military organization when you have this other organization, namely the American National Red Cross, which is trained to do these various functions which you want them to do, is that correct?

A. Without a doubt.

Q. And for such reason your opinion was so given as to that question, wasn't that correct?

A. I haven't restricted it to that reason. That's one of the reasons.

Q. What are the other reasons, sir?

A. That even if they did it, there is the practical, pragmatic difficulty of—or, if they attempted to do it—of eliciting approval from the budgetary committees of the Congress to pay out huge sums of money to substitute for a service which is adequate, doesn't have these expenses and is doing a fine job.

Q. And because of the popularity of the American Red Cross and its past reputation, Congress wouldn't stand still for it, would they?

A. I don't know that it is solely because of the popularity.

Q. Well, from economic aspects as well, isn't that [fol. 176] correct, sir?

A. Well, now, I am a little confused as to where I was in answering this question. I started to say I don't know that it is the popularity alone. I think Congress is cognizant of that, but I think they would take an extremely dim view of scrapping an organization that is doing an outstanding job and for years has been historically dedicated to humanitarian services and set them aside and increase the armed forces to do it otherwise.

Q. To do it by the military services?

A. To set money aside for military or civilian either could be costly.

Q. Isn't it true that although they aren't recognized and given the recognition that the American National Red Cross is that the armed forces and their dependents benefit from the services of the Salvation Army?

A. I think they do in some instances.

Q. Is this not also an economic savings to the Department of Defense and United States Government?

Mr. Massar: I object to this line of questioning, and I fail to see its relevancy as to the nature of the American Red Cross. We never prove the nature of one by proving the nature of the other.

Mr. McKevitt: Well, my purpose is not that. My purpose is to clarify the question which counsel previously [fol. 177] posed to the witness, namely this is the sole functioning agency that aids the United States Government.

The Court: I think the subject was raised by the Government on that point. You may inquire.

By Mr. McKevitt:

Q. Did you finish your answer, Mr. Jackson?

A. I don't think I gave an answer. I would like to ask—

The Court: Will you read the question?

The Reporter: "Is this not also an economic savings to the Department of Defense and United States Government?"

A. (Continued) I am not certain, but I certainly wouldn't challenge that along the area of the various problems that arise that the Salvation Army at times and possibly other agencies make some contribution of assistance to the members of the armed forces.

By Mr. McKevitt:

Q. And is this not also of economic benefit to the Department of Defense?

A. Well, I am not familiar with the extent that they have done so, and it would be difficult to make an appraisal of the economic benefits.

Q. Isn't that a possibility, Mr. Jackson?

A. Possibility. I would certainly not want to disparage the services of any other of these fine agencies, but I think if it wasn't rendered by them it would be rendered by the [fol. 178] Red Cross anyhow, if it were the type of service I have been referring to here.

Q. But the fact still exists they do render these services to the military forces and their dependents?

A. I haven't said they do. I said I would not challenge any evidence that they did. I do not know that they do.

Mr. McKevitt: That's all I have.

Redirect examination.

By Mr. Massar:

Q. Judge Jackson, is there any agency other than the American National Red Cross which is authorized by the military to investigate and report to it with respect to family history, medical history, or other matters in connection with the determination by the military of matters of compassionate reassignment or discharge or for use in connection with sentencing of convicted military personnel at military court-martials or for use in connection with medical diagnosis or treatment of personnel?

A. I have indicated in my direct testimony, at least intended to, that these were unique services, barring the rare possibility of specific instances, that were uniquely provided and set forth in the regulations and the directive implementing the law, and that's my firm belief.

Q. You mean anything provided by the American National Red Cross? You mean uniquely furnished by the Red Cross?

[fol. 179] A. That's right.

Q. So, if the Salvation Army did furnish services to the military, it would not be services of the nature you described in my previous question?

A. That is right, with the possibility of a rare instance where they might have come into the picture. I know of none, and I know this is the standard operating procedure for the American National Red Cross to provide particularly these three types of services.

Mr. Massar: Thank you.

Recross examination.

By Mr. McKevitt:

Q. But, there are other services as well which are given to military services and military people and their dependents, are there not, sir?

A. I think I have answered that to the best of my ability.

Mr. McKevitt: All right. That is all I have, Your Honors.

The Court: You may step down.

May the witness be excused, counsel?

Mr. McKevitt: I have no objection, Your Honor.

The Court: You will be excused.

The Witness: Thank you, Your Honor.

Mr. Massar: Edward McDermott.

[fol. 180] Edward A. McDermott called as a witness by the plaintiffs, being first duly sworn, on his oath testified as follows:

Direct examination.

By Mr. Massar:

Q. Your full name, please?

A. Edward A. McDermott.

Q. Your address?

A. 5400 Albermarle Northwest, in Westmoreland Hills, Maryland, which is a suburb of Washington.

Q. What degrees do you hold and from what institutions?

A. I have a Bachelor of Arts degree from Loras College in 1939, Juris Doctorate degree of the College of Law, University of Iowa, '42, and an Honorary Doctorate degree in 1962.

Q. Of what bars are you a member?

A. I am a member of the bar of the States of Iowa and Nebraska, the bar of the United States District Court for the Northern District of Iowa, the bar of the District Court of the District of Columbia and the Supreme Court of the United States.

Q. What has your professional experience been since graduation from law school?

A. In the early years of my professional career I was in the corporate law department of Montgomery Ward and [fol. 181] Company in Chicago. Subsequent to the war, I entered the private practice of law in Dubuque, Iowa, and I practiced law there until 1950. At that time, I was appointed chief counsel of a committee of the United States Senate. I served in that capacity in Washington for a period of approximately one year, returned in 1959 to the general practice of law in Dubuque, Iowa, continuing there until early 1961 when I took a leave of absence from my law firm and was appointed Deputy Director of the Office of Civil and Defense Mobilization in the Executive Office of the President by President Kennedy.

Q. Would you state what your connection has been with the disaster relief programs of the Federal Government?

A. In my capacity as Deputy Director of the Office of Civil and Defense Mobilization, 1961 and 1962, I had association with the Federal disaster assistance program, and then in 1962 when President Kennedy founded or established the Office of Emergency Planning as an element of the Executive Office of the President, I was appointed

Director of that agency and served in that capacity until February 1st of this year, 1965.

During my tenure as Director of the Office of Emergency Planning, I had responsibility on behalf of the President for coordination and directing all Federal assistance in presidentially declared major disasters.

Mr. Massar: I would ask the Court at this time to take [fol. 182] judicial notice of Public Law 875 of the 81st Congress, Second Session, which appears in Volume 64 of the Statutes at Large, at pages 1109 to 1111, and in Title 42 of the United States Code, Section 1855, 1958 Edition, and Supplement 5 to the 1958 Edition.

By Mr. Massar:

Q. Mr. McDermott, would you describe for us the congressional scheme for Federal disaster relief?

A. Well, under Public Law 81-875, when a natural disaster of major proportions occurs in any of the states of the United States or territories or possessions of the United States covered by the act, the governor or chief executive officer of the territory may petition the President or request the President for the declaration of a major disaster.

That request is administratively referred by the President to the Director of the Office of Emergency Planning, whose field personnel will have made a survey of the particular disaster, and on the basis of that survey the Director of the Office of Emergency Planning makes a recommendation to the President whether this particluar disaster qualifies for presidential declaration.

If the Director so recommends and the President approves the Director's recommendation, the President makes a declaration of major disaster for the defined area.

With that presidential act, then there is invoked the services and activities of a large number of Federal depart- [fol. 183] ments and agencies who have specifically assigned responsibilities to assist in the disaster problem, and the

activities of the several departments and agencies as well as the activities of the American National Red Cross are coordinated on behalf of the President by the Director of the Office of Emergency Planning.

Federal disaster assistance in terms of direct expenditure of Federal funds are given to the public sector damaged in the disaster. Federal funds are disbursed for a wide range of enumerated eligible purposes, such as the restoration of roads and bridges, the restoration of publicly owned utility systems, the restoration of water and sanitary sewage systems, the restoration of transportation systems, the clearing of debris, the elimination of area-wide health hazards, those sorts of programs.

There is no direct Federal program that addresses itself to the individual and personal needs of the private citizens who have been so adversely affected by that disaster. The private citizen relief and the private sector relief in terms of direct financial or material assistance is through the American National Red Cross, rather than through the Federal Government.

Q. As a result of any statutory duty imposed upon the American National Red Cross?

A. Yes, it is in furtherance of its charter obligation un- [fol. 184] der the charter of the American National Red Cross and it is pursuant also to an agreement that has been worked out between the executive branch of the Government and the American National Red Cross, approved by the Congress of the United States.

There is a memorandum of understanding between the Office of Emergency Planning and the National Director of the American National Red Cross, which generally defines the respective areas of operation and responsibility.

Q. Is the statutory provision to which you refer the provision of Section 3 of Title 36, which in enumerating the purposes of the American National Red Cross says, "to continue and carry on the system of national and international relief in time of peace and apply the same in mitigating the

sufferings caused by pestilence, famine, fire, floods, and other great national calamities, and to devise and carry on measures for preventing the same"?

A. It is my understanding—

Mr. McKevitt: I would like to suggest to the Court that there is an obvious ambiguity and that is for the Court to determine.

The Court: I think the question is whether it was referring to this section. The witness may answer.

By Mr. Massar:

Q. You may answer.

A. I believe I indicated that was my understanding.

[fol. 185] Q. You referred to a statement that was prepared between the Office of Emergency Planning and the American National Red Cross. Was that statement prepared while you were Director of Emergency Planning?

A. Yes, it was.

Q. I show you a document which has been marked for identification as Plaintiffs' Exhibit 8, and ask you whether that is a correct copy of the statement of understanding to which you refer?

A. It is.

Q. Did you sign that statement?

A. I signed the statement on August 3, 1962, as Director of the Office of Emergency Planning, and it was signed in my presence and on the same date by General Alfred M. Gruenther, as President of the American National Red Cross.

Mr. Massar: I offer this document, of which a copy has been furnished to counsel.

Mr. McKevitt: This is one copy I did not reecive. I got all the others, but I didn't get this one.

The Court: Hand him the original, please.

Mr. Massar: And for the convenience of the Court, I hand up three additional copies of the document.

(Copies of Plaintiffs' Exhibit 8 were handed to the Court and counsel.)

Mr. McKevitt: May I have a minute to review the docu-
[fol. 186] ment?

The Court: Yes.

(Counsel perused the exhibit.)

Mr. McKevitt: I have no objection. I would like to ask counsel for a copy.

Mr. Massar: I furnished you one by mail and I thought I furnished you another this morning.

The Court: Let's not argue about it. Give him a copy. Exhibit 8 will be admitted.

(Plaintiffs' Exhibit 8 was received in evidence.)

Mr. McKevitt: Is that the one you mailed to me?

Mr. Massar: Yes, it was.

Mr. McKevitt: All right. May I have a moment?

Mr. Massar: Will you see if you have it?

The Court: Proceed with the witness, counsel.

By Mr. Massar:

Q. Do individual disaster victims ever seek directly from the President or from the Office of Emergency Planning the relief assistance for their individual disaster-caused needs?

A. Yes, very frequently, and without exception when a major natural disaster occurs.

Q. What does the President or Office of Emergency Planning do with the requests?

A. Those requests reach the Office of Emergency Plan-
[fol. 187] ning from primarily three sources. One, the referral from the President's office of letters addressed to him by individuals. Secondly, the referral to the Office of Emergency Planning by members of Congress of letters addressed to them by constituents. And, thirdly, letters addressed directly to the Office of the Director of Emergency Planning.

In all of these instances where the request relates to individual suffering or individual and personal requirements to recoup from the effects of disaster, those inquiries and requests are referred to the American National Red Cross, with an explanation of the Federal disaster program, explaining that the Federal governmental program applies to the public sector.

Q. Are contributions ever forwarded to either the President of the United States or Office of Emergency Planning to assist in the Federal Government's disaster relief program?

A. It frequently occurs from the occurrence of a major public disaster, particularly one that has received considerable publicity such as the Alaska earthquake and things of that nature, that charitable individuals or others who have not suffered will send offerings to the Office of Director of Emergency Planning to assist individuals in the alleviation of that disaster.

It was the procedure while I was Director of that agency to acknowledge those funds on behalf of the President, or [fol. 188] myself if they were addressed to me, and transfer the funds to the American National Red Cross.

Q. Would you give us some example of the recent disasters and describe the working relationships that existed between the Red Cross and the Office of Emergency Planning and other Federal agencies in caring for those disasters?

A. I will endeavor to summarize concisely as I can what, of course, with the concerns of a major disaster, becomes a very involved and complex situation.

First of all, the Office of Emergency Planning, as the President's disaster agency, is in touch with the American National Red Cross at the Washington level as soon as a disaster threatens. That close liaison continues at the national level throughout the active period of Federal disaster assistance.

Also, in the area directly affected by the disaster, there is close liaison between the regional authority of the Of-

fice of Emergency Planning, the regional representatives of other involved Federal departments and the local representatives of the American National Red Cross.

Frequently when a disaster occurs such as the flooding in the Ohio River Valley, the President will personally wish to make an inspection trip of the area. The same thing happened in the hurricane and highway damage in Florida and Georgia about a year ago. When presidential inspection trips are taken, the President is normally accompanied [fol. 189] by the heads or policy level representatives of the Federal departments that will have a major involvement in rehabilitation, and in every instance by the National President or a national officer of the American National Red Cross, so that in the performance of Federal disaster assistance relief activities, both at national level and on the scene, there is a continuing close liaison between the Federal departments and Red Cross personnel in furtherance of the implementation of disaster assistance which restricts Federal assistance to the public sector and American National Red Cross assistance to the private sector.

Mr. Massar: I have no further questions of the witness at this time.

Pardon me, my colleagues question my recollection that the statement of understanding was received in evidence. I assume it was.

The Court: It was admitted, that's correct.

Cross examination.

By Mr. McKevitt:

Q. Mr. McDermott, you are no longer with the Office of Emergency Planning, are you?

A. I resigned from that position effective February 1, 1965, and on that date became a partner in a law firm in Washington, where I am now engaged once again in the private practice of law.

[fol. 190] Q. And you are working in international commercial law at the present time?

A. Yes, and hopefully to a greater extent in the future.

Q. Referring to Plaintiffs' Exhibit No. 8, which I take it you are familiar with—

A. Yes, I have a copy of it here.

Q. All right, sir, this was an agreement, was it not, entered into between the Office of Emergency Planning and the American National Red Cross on August 3, 1962?

A. That's correct.

Q. And it was a bilateral agreement, was it not?

A. A bilateral agreement.

Q. Is this agreement still in effect?

A. To the best of my knowledge, it is. It was in effect when I resigned from my responsibilities as of February 1st.

Q. And this agreement, was it drawn up to serve as a sort of a guideline as to the cooperation between the Office of Emergency Planning and the American National Red Cross under Title 42?

A. Correct, the purpose of this agreement, counsel, was an effort to reduce to writing in a concise a form as possible the working relationships that were intended to exist between the various Federal departments and the American National Red Cross in disaster situations.

This is in essence the reflection of the operational pro-
[fol. 191] cedures as they were being carried on, and General Gruenther and I concluded that it would be advantageous to all concerned to reduce this understanding to this written form for distribution, not only to those in the Federal Government who are concerned with the public sector assistance, but also to Red Cross personnel who are concerned with the private sector, so it was strictly a bilateral agreement and arrangement beween the Office of Emergency Planning and American National Red Cross.

Q. And it was entered into on a voluntary basis by both organizations and no direction by Congress or anything else that the agreement be entered into?

A. That is correct. There was no direction. It has been referred to on several occasions on committees in Congress and other committees who have occasion to discuss disaster situations, but it was not done in pursuance to a congressional direction.

Q. And as far as this agreement is concerned or so far as the working arrangements are concerned, you do not subsidize the Red Cross or give them any direct cash grants or any financial assistance, do you?

A. No, the Office of Emergency Planning does not, and the only financial transactions that existed between the Office of Emergency Planning and Red Cross were this routing of funds received in a post-disaster situation from in-
[fol. 192] dividuals throughout the United States, to which I alluded.

Q. This is done on a protocol or voluntary basis where the funds are received by the President of the United States or Director of Emergency Planning and you are in a situation where you must tender them to an organization so you tender them to the Red Cross through a voluntary act?

A. Well, you have some options. Generally, funds received—there are instances where funds are received by the President or Federal Government from individuals not specifically earmarked for any purpose and we transfer those funds to the Secretary of Treasury, but in this instance where they are disaster related and are intended for the relief of suffering of individuals as the result of the disaster, in furtherance of the Federal program which recognizes the Red Cross as the agency to administer to those needs, they are transferred to the Red Cross, but that's done simply in furtherance of the total Federal disaster assistance program.

Q. But it is not done through statutory requirement?

A. No, no statutory requirement.

Q. It is done particularly where you have a contribution from an individual to you as distributor?

A. Correct, and we are carrying out the intention of the contributor.

Q. As I understand your testimony, is it not correct that the purpose of this agreement with the American National [fol. 193] Red Cross as far as disaster relief is concerned under Public Law 875 and Title 42, which we have been discussing previously, is that the Federal Government, namely the Office of Emergency Planning, steps in and takes care of the public needs and American National Red Cross takes care of the private needs?

A. That's a fair statement of the broadest aspects of Federal disaster assistance, yes.

Q. Take, for example, the present Denver situation where the Governor has requested financial assistance from the United States Government—these moneys which are so tendered by the United States Government, if and when, would be used for public purposes only?

A. That's correct.

Q. And none of them would be tendered to the American National Red Cross?

A. That is correct.

Q. They would be, as you say, highway construction, bridges, sewage facilities and water and et cetera?

A. That's correct.

Q. And you would expect the American National Red Cross, so far as financial assistance is concerned, to work that out and maintain their own situation?

A. That is supported by voluntary contributions which it receives and from other private sources.

[fol. 194] Q. You worked on the Alaska disaster, did you not, Mr. McDermott?

A. Yes, I did, sir.

Q. And you have, I would say, probably somewhat of a great personal knowledge of the operations up there?

A. I have quite a lot of knowledge. I was the first Federal official to arrive on the scene and was there eight or nine times subsequently.

Q. Is it not true that the local chapters of the Salvation Army assisted up there as well?

A. They did an outstanding job, as well as many other formal and informal voluntary organizations and associations of individuals.

Q. Which all worked together in addition to the American Red Cross?

A. Correct, under the general coordination of the American Red Cross as it relates to private sector relief.

Mr. McKevitt: That is all I have, Your Honors.

The Court: Any further questions?

Mr. Massar: I have no further questions of this witness.

Mr. McKevitt: I have no objection to the permanent excusal of the witness, Your Honor.

The Court: You may be excused.

The Witness: Thank you, Your Honor.

[fol. 195] Mr. Massar: Philip Schenkenberg.

PHILIP R. SCHENKENBERG called as a witness by the plaintiffs, being first duly sworn, on his oath testified as follows:

Direct examination.

By Mr. Massar:

Q. Your full name, please?

A. Philip Rosen Schenkenberg.

Q. Your address, please?

A. 4050 Lindell Boulevard, St. Louis, Missouri.

Q. What degrees do you hold and from what institutions?

A. I have a Bachelor of Law degree from Marquette University, Milwaukee, Wisconsin, 1933.

Q. By whom are you employed and in what capacity?

A. The American National Red Cross. I am the Area Manager for the Mid-Western Area, consisting of 16 states, including the State of Colorado.

Q. And how long have you been employed by the American National Red Cross?

A. Since 1942.

Q. What do your duties consist of?

A. As the Area Manager, it is my responsibility to see that the local units of the American Red Cross, known as chapters, are provided with information and service to develop programs for people in the jurisdictions for which they are responsible.

[fol. 196] The second responsibility is to provide the Red Cross services to the armed forces on military installations and in military hospitals within this 16 state area, and, third, to be responsible for the operations of disaster relief in major disasters that occur in those 16 states that are beyond the ability of the local units to handle.

Q. Do your duties require that you be familiar with the charter, by-laws and other operating regulations of the American National Red Cross?

A. Yes, sir.

Q. And are you familiar with the charter and by-laws of the American National Red Cross?

A. Yes, sir.

Q. I hand you a document which has been marked Plaintiffs' Exhibit 9 for identification, and ask you whether this contains an accurate copy of the charter and by-laws of the American National Red Cross as of this date?

A. Yes, sir.

Mr. Massar: I offer this in evidence and call to the attention of the Court that this document has some slight changes which have occurred since the—

The Court: Let's take care of the offer. Do you have any objection?

Mr. McKevitt: I have no objection, Your Honor.

[fol. 197] The Court: It will be admitted.

(Plaintiffs' Exhibit 9 was received in evidence.)

Mr. Massar: This is slightly different from the copy which was offered at the pretrial, embodying some changes that have occurred in the last year.

The Court: Are there any changes that are significant?

Mr. Massar: There are a couple that might have been significant on the issue that we thought was in the case but which has been withdrawn, so for all practical purposes this document is no different than the one that was offered on the pretrial.

This one was for the convenience of the Court. The clerk already has the official one in evidence.

The Court: Does counsel have a copy?

Mr. Massar: Yes, he does.

Mr. McKevitt: Counsel has advised me of this copy, Your Honor.

The Court: It will be admitted.

By Mr. Massar:

Q. Has the Board of Governors of the American National Red Cross adopted any rules or regulations for its management now in effect apart from the by-laws which have just been introduced in evidence?

A. Yes, sir.

Q. And what are they shown as?

[fol. 198] A. The Code of Procedure.

Q. And what does the Code of Procedure cover?

A. The Code of Procedure sets forth the basis on which local units, chapters, will be organized, operated and dissolved. It also provides for the rules of conduct for the national convention and establishes an area advisory council of volunteers.

Q. I hand you a copy of the document which has been marked for identification as Plaintiffs' Exhibit 10, and ask you whether that is a correct copy of the Code of Procedure of the American National Red Cross as of this date? Do you have a copy of that?

A. Yes, sir.

Mr. Massar: I offer this document in evidence. The clerk has the one that has been marked for identification and I hand up one for the convenience of the Court.

Mr. McKevitt: Defendant has no objection, Your Honor.

The Court: It will be admitted.

(Plaintiffs' Exhibit 10 was received in evidence.)

Mr. Massar: And I again point out to the Court that there is a slight modification in there which occurred since the date of the pretrial order. However, the change is not significant for any purposes of this trial.

By Mr. Massar:

Q. Mr. Schenkenberg, would you please describe in brief form the services rendered the armed forces by the Ameri- [fol. 199] can National Red Cross?

A. To elaborate a little bit on what has been given in prior testimony, I would point out that the United States does maintain a rather large armed force, that these personnel are distributed not only throughout the United States but in foreign countries. A large number of the military are married and have families and many of them are separated from their families. There are, I believe, something in the neighborhood of four million dependents of the armed forces, and most of these dependents are in the continental United States.

There are four major areas of service in the welfare field that the Red Cross carries on. The first is communication service, which is the means by which the Red Cross endeavors to exchange information between the home community, the home family, and the serviceman, wherever he may be stationed. This often occurs in connection with births and serious illness, these kinds of family problems that do occur.

The second program is the reporting service. This has been referred to by the Department of Defense witness, in which the military officials look to the American Red Cross

to obtain information for them, to verify certain data or information upon which they can rely in order to make a decision. This has to do with granting emergency leaves, extension of emergency leaves, compassionate transfers, discharge for compassionate reasons, medical histories, medical discharges, and some of the others that were men-
[fol. 200] tioned earlier.

Then the third service within the welfare field is financial assistance, because in some of these family problems that do occur there is a financial need.

And, fourth, there is the counseling services. Because there are personal problems, family problems, the Red Cross personnel are available to counsel both with the member of the armed forces and/or with the family in order to try to relieve or eliminate the problem.

These are the four general broad areas of service.

Q. Are these services rendered by reason of a belief of the American National Red Cross that these would be desirable services to render, or are they rendered because the duty is imposed upon the American National Red Cross—

Mr. McKevitt: I object. It is a leading question, Your Honor.

Mr. Massar: May I finish the question, Your Honor?

Mr. McKevitt: Excuse me, counsel.

Q. (Continued) Or are these services rendered because the statutory act by which the American National Red Cross was incorporated imposes upon it the duty to render these services?

Mr. McKevitt: I object, Your Honor. First, it is leading, and, secondly, it relates to a matter which is a determination of the Court.

The Court: I believe he may state his opinion on the
[fol. 201] subject.

A. The position has been adopted by the Board of Governors that there is an imposition on the organization to provide these services as called for in rather broad terms in the

charter, and in consultation with the Department of Defense this has been the determination of the program that should be provided to meet the imposition of duties called for in the charter.

Q. Specifically, do you refer to subdivision 4 of Section 3 of the corporation's charter as imposing these duties on it?

A. Is this the section that sets forth the purposes?

Q. Yes, it is, and reads, "To act in matters of voluntary relief and in accord with the military authorities as a medium—"

Mr. McKevitt: I am sorry to interrupt.

The Court: Just refer to the section. The witness knows the section. What was your answer?

The Witness: Yes.

The Court: All right.

By Mr. Massar:

Q. Does any other organization apart from the American National Red Cross render the kind of services to which you referred to the military departments?

A. Not to my knowledge.

Q. Could you describe a typical case in which the Ameri- [fol. 202] can National Red Cross is requested by the military to investigate and report on matters on which the military needs to be informed and needs to take action of some kind?

A. Well, this is an actual case still being served. A man is stationed with the armed forces, stationed in Turkey on an 18 month tour of duty. While he is gone, his wife and small child are staying with the wife's parents in California. The child developed a heart condition, which local medical authority felt should be taken care of by surgery.

There was communication between the Red Cross chapter in California and the Red Cross field director in Turkey, who in turn talked with the man to inform him of the de-

veloping conditions, also verified this with the commanding officer.

The question was raised as to whether or not the man should be given emergency leave. The commanding officer withheld decision, asking for more information with regard to what the plans were. It was reported back that it would take a little bit of doing to have this surgery arranged for. It was to be arranged for at a military hospital because of it being a dependant of a man in the armed forces.

The chapter arranged for the mother and child to come to Denver, provided transportation for them to get here. The local Red Cross chapter helped the mother get temporary housing. The child was admitted to Fitzsimons General Hospital. The medical authorities decided that condi- [fol. 203] tions were not proper for surgery, so—

Mr. McKevitt: Your Honor, I hate to interrupt the witness. I think this is a hearsay answer.

If there is any testimony he can give as to his personal knowledge, I don't mean to cut out a living example, but at the same time he keeps referring to the chapter did this and the family did this and said that.

Unless he was there when the conversation was given, it is hearsay and objectionable, and I move the answer be stricken.

The Court: He is probably going into unnecessary detail, but we take it as a description of the mechanics in handling this type of case, and I think for that purpose it is proper.

Mr. McKevitt: All right, sir.

A. (Continued) The result was that the operation was finally arranged. Timing was reported back to Turkey. Arrangements were made by the commanding officer to grant the man emergency leave. He got back here to be here for the operation.

It turned out that the medical military authorities said that the child should continue to have treatment, and this

necessitated the serviceman's desire to ask for a compassionate transfer, so here was the inner workings of the [fol. 204] Red Cross, the serviceman, the family and the commanding officer in trying to arrive at some proper plan for this serviceman and his family.

By Mr. Massar:

Q. Are the services such as you have just described rendered in war as well as peace?

A. Yes, sir.

Mr. Massar: I at this time offer in evidence a report, the annual report of the American National Red Cross, for the year ended June 30, 1962, which has been marked Plaintiffs' Exhibit 12 for identification, there being no Exhibit 11, a copy of which has been furnished to counsel for the State and an additional copy of which is handed up for the convenience of the Court. This is offered as an official document.

Mr. McKevitt: If Your Honor please, I rise to a point of possible disagreement with counsel that I will have no objection to the admissibility of the annual reports of plaintiff in this action if he will have no objection to those annual reports of plaintiff which I may tender which he fails to tender to the Court.

Mr. Massar: I have no objection to his tendering any annual report of the American National Red Cross for any year.

Mr. McKevitt: I have no objection, Your Honor.

The Court: No. 12 will be admitted.

[fol. 205] (Plaintiffs' Exhibit No. 12 was received in evidence.)

By Mr. Massar:

Q. Mr. Schenkenberg, are you familiar with the 1962 Annual Report of the American National Red Cross, a copy of which has just been received in evidence as Exhibit 12?

A. Yes, sir.

Q. And does it describe the services rendered in a typical peacetime year by the American National Red Cross?

A. Yes, sir.

Q. What additional services has the American National Red Cross rendered to our armed forces in time of war that is additional to those which you have described?

A. Well, I described what we called the welfare services. There are other services that we have provided, some of them only in wartime, others that are provided in peacetime but on a reduced basis.

For example, prisoner-of-war packaging and distribution, which is only done in wartime, the making of surgical dressings, the knitting of sweaters and other special type garments for members of the armed forces.

We have collected large amounts of blood and distributed blood and blood derivatives to the armed forces. We have assisted in nurse recruitment when many more nurses were needed. We have operated recreational facilities in military facilities, and we still do this on a medically approved basis [fol. 206] for those that are hospitalized. These are some of the other kind of services we perform.

Q. Do you in time of war render assistance to the injured on the battlefield?

A. The American Red Cross has not.

Q. Their services are limited to the hospitals?

A. Of our own personnel.

Q. The hospitals to which you have just referred are hospitals in battle areas, are they not?

A. They are all military hospitals.

Q. Actually in combat areas?

A. Yes.

Q. They are not at home necessarily?

A. Wherever the military has hospitals, we have personnel providing welfare services, recreation, comfort and this type of service.

Q. Are any other organizations apart from the American National Red Cross permitted to render any such services in military hospitals?

A. This question is one like we got hung up on before, I think. The Red Cross is the vehicle by which these services are offered. It is the organization through which the military expects to have services performed, so that, for example, if there is a group that would like to provide some volunteer service in Fitzsimons General Hospital this is [fol. 207] arranged through the Red Cross, but we are happy to take advantage of all offers of volunteer service or goods.

Whether it is the Salvation Army or the Lions Club or the American Legion or whatever organization, we are the vehicle through which these people are able to come in and provide these services in the military hospital. Now, this is not true in the Veterans Administration hospitals, but it is true in the military hospitals.

Mr. Massar: In accordance with counsel's offer or statement that he makes no objection to receipt in evidence of any annual reports of the American National Red Cross, I now offer in evidence annual reports for the years 1941, '42, '43, '44, '45 and '46, which have respectively been marked for identification as Plaintiffs' Exhibits 13, 14, 15, 16, 17 and 18, copies of which have been furnished to counsel for the State, and identical copies were reposing with the clerk and these additional copies being handed up for the convenience of the Court.

Mr. McKevitt: I wish to just check the marking, if I may, counsel, please?

Have these been marked?

Mr. Massar: Oh, I haven't marked these. Those are the marked ones.

Mr. McKevitt: Excuse me a second, sir.

(Counsel perused exhibits.)

[fol. 208] Mr. McKevitt: I have no objection, Your Honor.

The Court: Exhibits 13 through 18 will be admitted. Proceed, counsel, let somebody else mark those.

(Plaintiffs' Exhibits 13, 14, 15, 16, 17 and 18 were received in evidence.)

By Mr. Massar:

Q. Mr. Schenkenberg, are you familiar with the annual reports of the years 1941 through 1946, copies of which have just been received in evidence as Plaintiffs' Exhibits 13 through 18?

A. Broadly stated, yes.

Q. And do they in your opinion reflect the services, the typical services, rendered by the American National Red Cross during the war years?

A. Yes, sir.

Mr. Massar: I have no further questions of the witness.

Mr. McKevitt: May I inquire of the wishes of the Court so far as the lunch hour is concerned, Your Honor?

I would estimate my cross-examination would last 10 to 15 minutes approximately.

The Court: We will take the noon recess. Counsel, how many more witnesses do you have?

Mr. Massar: I have no further witnesses. I have further documents which I will offer up to the Court without the need of witnesses.

[fol. 209] The Court: How long do you expect that will take?

Mr. Massar: I have approximately 40 documents and I would say the time required will depend altogether on what objections, if any, Mr. McKevitt will have.

I think the authenticity of all except perhaps one or two of those documents have been waived by counsel and I—

The Court: Fine, well, if during the noon hour you would be sure the documents are marked and that the two of you would be sure that you each have the same copies.

Has counsel been furnished copies of all of them?

Mr. Massar: He has a copy of each and I am confident an exact copy of each will be offered.

Mr. McKevitt: I might state to the Court, if the Court has any question regarding the length of the noon hour we will easily finish this afternoon. We have no witnesses and ours will be based on cross-examination and the submission of exhibits and possibly one more exhibit.

The Court: We will be in recess until 1:30.

(The Court recessed at 12:02 o'clock p.m. and reconvened at 1:30 o'clock p.m.)

Cross examination.

By Mr. McKevitt:

Q. How many areas do you have throughout the United States, Mr. Schenkenberg?

A. There are four domestic areas and two overseas areas.

[fol. 210] Q. And you are the administrator of one of these areas?

A. Yes, sir.

Q. And that's the Mid-West area in St. Louis?

A. Yes, sir.

Q. And you were previously handed annual reports for the years 1941 through 1946. Would you state, in your opinion, Mr. Schenkenberg, that all facts and statements in there are true and correct, to the best of your knowledge?

A. To the best of my knowledge.

Q. Were you employed by the Red Cross during the war years?

A. I started in 1942.

Q. And were you employed by the American Red Cross in 1946?

A. Yes, sir.

Q. Is it not correct that Mr. Basil O'Connor was the Chairman of the National Red Cross for the year ending 1946?

A. He was Chairman of the American Red Cross. For what the exact years were, I do not recall.

Q. But he was during the year of 1946, or one of the years, was he not?

A. Well, as I recall—I do not recall the specific years—he was during part of the war period, World War II period. As best as I can remember, he was the Chairman in 1946.

[fol. 211] Q. As Chairman, he was vested with the primary administration of the American National Red Cross, was he not?

A. Yes, sir, he was the chief officer.

Q. In other words, he is an active chairman. He is not an honorary chairman, is that correct?

A. That's correct.

Q. Sort of like the president of the board or president of the corporation or chairman of the board?

A. Yes.

Q. Now, in addition to your services for armed forces, veterans and so forth, it is true, is it not, that you also perform work in the way of blood service, nursing, safety services for chapters, educational programs, public information, international services?

A. Yes, sir.

Q. And these relate to private causes, do they not?

A. All programs that we have are related to the two basic functions of the organization, namely, to serve the armed forces and disaster victims. These programs to which you refer, such as the blood program, first aid, water safety, nurse instruction, our youth movement, our office of volunteers, these are all in existence in the organization in order to be prepared to meet the emergency services that are required under the charter.

Q. Well, it is also for the betterment of the community [fol. 212] and for private individuals?

A. We hope so.

Q. I mean, a continuing blood bank, for example, and so that children won't drown in the waters, and et cetera, isn't that one reason you maintain those programs?

A. Yes, sir, but they all stem from these other two responsibilities. For example, the first aid program was an outgrowth of the earthquake in San Francisco, and when a good many people died because they didn't know how to treat their injuries it was decided that this was a program that the Red Cross should engage in in order to reduce the loss of life and injury in the time of disaster. Each of the programs originated this way.

Q. Is it not correct that local chapters have optional provisions or rights to conduct separate programs, if their budget allows and the time allows, et cetera?

A. Yes, sir, there are only four duties that a chapter must perform, the local unit. One is to give service to the armed forces, the other to give disaster relief assistance, to conduct a fund appeal to support these things, and to interpret the Red Cross to their community, and then there are these other programs that are optional with the local units.

Q. For the year ending 1963, would you deny the fact that approximately 33⅓ percent of the American National Red Cross budget was used for armed forces, veterans and [fol. 213] their families, and the remainder was used for disaster service, blood service, nursing, safety service or programs, educational programs, international services and general management?

A. Well, I have not looked at the annual report for that period, but the percentage figure will fluctuate from year to year because the amount spent on disaster fluctuates, so that it might be a third one year and it might be 50 percent another year.

In our publicity, we generally say that about 40 percent of the funds spent by the Red Cross are spent in the services to the armed forces program. Now, this is the program I described before lunch as the welfare program.

We do not, as a matter of recordkeeping, break down what costs we may have in providing swimming instruction, providing blood services to the armed forces, instructor courses in first aid. We may provide these services, but we have not separated those in the dollar figures that you refer to in the annual report, so this is a minimum figure in the annual report actually of what we spend for the armed forces.

Q. Well, is it your testimony, Mr. Schenkenberg, that all these Gray Ladies we have around and station wagons and so forth and movement of patients and blood programs are all for one prime purpose, to keep ready for war and national disaster?

A. Yes, sir.

[fol. 214] Q. Solely for that purpose?

A. To be prepared to carry out the responsibility.

Q. How often do you use water safety instructors during a national disaster, do you know?

A. Well, we don't have too frequent use of this. As I mentioned before, we have the water safety program as an outgrowth of the broad description of endeavoring to prevent disaster, disaster in the form of drownings.

Occasionally, we are called upon to assist in recovering bodies that have been drowned persons, and as I mentioned before we do provide such training courses as survival swimming for the armed forces.

Q. Is it not true that in some years, Mr. Schenkenberg, the majority of your moneys expended go to non-governmental personnel or dependents?

A. Yes.

Q. Do I understand your testimony previously to state that the Salvation Army and other agencies have assisted you?

A. Well, are you talking about disaster or services to the armed forces?

Q. Both.

A. Well, in disaster service to the community, we endeavor to rally all the resources of the community to help

the disaster victims, and this includes a multitude of community organizations, men's groups, women's groups, [fol. 215] church groups and the Salvation Army.

In the program for the armed forces, the only program that I think of at the moment in which we are involved in utilizing other organizations is in connection with the recreation program in military hospitals, where we have a limited professional staff, and we recruit volunteers from the local Red Cross chapter to provide these recreation activities for those that are hospitalized there, and we welcome the opportunity to use other volunteers from other community organizations.

Q. Mr. Schenkenberg,—excuse me, I am sorry, are you finished?

A. Yes, sir.

Q. All right. Well, during a natural disaster the Salvation Army, for example, doesn't have to wait for you? They can go right ahead and go into the area, can they not?

A. Yes, sir.

Q. They are not under your jurisdiction or control, are they?

A. No. However, many times, when the Salvation Army has performed a canteen service, the American Red Cross has reimbursed the Salvation Army for the supplies that they have purchased to provide the canteen service.

Q. I take it you are familiar with the makeup of the Board of Governors for American National Red Cross?

[fol. 216] A. Yes, sir.

Q. And there are 50 voting members, are there not?

A. Yes, sir.

Q. Of which the President of the United States appoints eight, and seven have a vote, is that correct?

A. I believe all eight have a vote. The Chairman has a vote if he chooses to exercise it.

Q. Is it the policy of the American National Red Cross to approve all of its measures by a majority vote?

A. Yes, sir.

Q. The President of the United States serves only as the honorary chairman? He is not the active chairman of the American Red Cross, is he?

A. No, sir.

Q. And you retain a private certified public accounting firm in Washington, namely Haskell and Sells, do you not, or in New York?

A. Yes, sir.

Q. And they conduct your annual audit, or one of them?

A. Yes, sir.

Q. And the Department of Defense conducts the other one, and you reimburse them for their expenses, is that not correct?

A. Yes, sir.

Q. You maintain a private general counsel office in [fol. 217] Washington, of which Mr. Harold Starr is General Counsel, is that not correct?

A. Yes, sir.

Q. And you maintain local counsel, such as Mr. Henderson, in Denver, who is on a retainer, is that not correct?

A. Yes, sir.

Q. You are not civil service?

A. No, sir.

Q. Are any employees of the American Red Cross, to your knowledge, under American civil service?

A. No, sir.

Q. You have your own retirement program?

A. Yes, sir.

Q. You also have workmen's compensation for all employees?

A. Yes, sir.

Q. And you are so insured by the Travelers Insurance Company?

A. Yes, sir.

Q. You also have or are qualified for retirement benefits, or your employees are, under the Social Security program, commonly known as OASI, is that correct?

A. Yes, sir.

Q. So, you have double benefits, namely OASI and your private retirement program?

[fol. 218] A. Yes, sir.

Q. Is it not also correct you retain a private insurance company, namely Travelers, to insure all your vehicles for liability, bodily injury and property damage?

A. I am no authority on the insurance program. We have some insurance in the general liability field, but as far as our own property is concerned we carry this as a self-insured item, so there are certain incidences that we do carry and some we do not.

Q. Let me phrase my question this way, is it not correct you do have insurance coverage from a private insurance company operating from a commercial profit venture to insure your motor vehicles which are titled in the name of the American National Red Cross?

A. No, it is my understanding that we are self-insured as far as our own vehicle is concerned, but our liability insurance is carried with Travelers.

Q. You mean for operation of automobiles?

A. For any damage that is done by those vehicles.

Q. All right, sir, thank you. Do you have a building in Detroit which you rent out or part of it to a profitmaking body? Is that not correct? In other words, you rent it out on a profit basis?

A. The Detroit chapter owns a building in which part of the building is subrented to other organizations, some of [fol. 219] which are commercial.

Q. And you collect rent on this building and this goes to the general fund of the American National Red Cross, is that correct?

A. No, the funds that come in the operation of that building are administered and handled by the local Red Cross chapter.

Q. Don't the local chapters turn their money over to the national headquarters in Washington and submit a budget yearly?

A. A portion of the annual fund appeal that is made is turned in to the national organization.

Q. Now, it is also correct, is it not, that you pay motor vehicle license fees and registration fees in each state in which you operate these vehicles which you own?

A. Yes, sir.

Q. You seek no immunity from the state or Colorado, for example, for this registration, do you?

A. No, by administrative practice this is considered to be desirable, to waive any eligibility for immunity.

Q. And you also pay a real estate tax on the building in Detroit for the portion that's to organizations—

A. That is income producing.

Q. Right.

A. Yes, sir.

[fol. 220] Q. You do not use Federal license plates on your vehicles within the United States or have your drivers operate with Federal driver's licenses, do you, Mr. Schenkenberg?

A. Not to my knowledge.

Q. In other words, you have the license plate of the state and the drivers are required to have a valid driver's license for that state, is that not correct?

A. Yes, sir.

Q. All your vehicles are titled in the name of the American National Red Cross, are they not?

A. Yes, sir.

Q. It is also correct, is it not, that you withhold state income tax from your employees in the State of Colorado?

A. I can't answer that question.

Q. You have two types of funds from which you operate, namely the general fund and the endowment fund, within the American National Red Cross, do you not, Mr. Schenkenberg?

A. Yes, sir.

Q. Would you state briefly or briefly describe both of these funds?

A. Well, the general funds are those funds that are obtained in the annual appeal for voluntary contributions, and the endowment fund was established for the purpose

of hopefully someday having a fund from which certain administrative costs could be paid from the earnings, so [fol. 221] as a matter of policy the Board of Governors deposits all funds received from bequests that are not restricted for some special use into the endowment funds, and only the earnings from the endowment fund are used each year and transferred to the general fund to supplement the amount that comes from the annual contributions received in the campaign.

Q. In other words, you don't touch the corpus of the endowment fund, is that correct?

A. That's correct.

Q. This is all done at the discretion of the Board of Governors and a committee of nine or a board of investment trust—I forget the exact title—which the Board of Governors appoints?

A. The Board of Trustees.

Q. And that is composed of nine people?

A. I believe so.

Q. And they are appointed by the Board of Governors?

A. Yes.

Q. And they make the decisions on the investments of the endowment fund?

A. Yes.

Q. Is it not correct that the endowment fund moneys are invested, in addition to U. S. Government bonds, in private companies, such as preferred stocks, bonds of private corporations?

[fol. 222] A. I believe that's correct.

Q. And also in common stocks, is that not correct?

A. I believe that's correct.

Q. And also real estate investments? You invest in real estate mortgages for this endowment fund?

A. I don't know the answer to that question.

Q. All right, sir. Then, am I correct in stating your prime source of financial support is from donations or from bequests or gifts going either into your endowment fund or fund-raising programs throughout the United States?

A. The major source of income is from the annual appeal to the public for funds, and this is supplemented by the earnings of the endowment fund and by earnings of the general funds.

Q. It is also correct that the Army audit agency of the Department of Defense never has rejected one of your annual reports, have they?

A. Not to my knowledge.

Q. Am I correct in stating that the Board of Governors in your national headquarters has the power to hire and fire employees on a local or chapter level?

A. The authority?

Q. Right.

A. Yes, sir.

Q. Now, it is also true, is it not, that you have representatives of Veterans Administration offices throughout the [fol. 223] country?

A. Veterans Administration regional offices.

Q. For what purposes are they there?

A. This is an expert who represents the veterans who have given the Red Cross the power of attorney to process their claims with the Government under benefits that are provided for under the laws for benefits to veterans. The veteran is in the community. The Red Cross chapter counsels, helps the veteran there, in making out his applications pursuing his claim, and the Red Cross field director at the Veterans Administration regional office will personally represent the veteran.

Q. He represents him on a legal basis as his legal counsel before the Veterans Administration?

A. No, sir, they are not attorneys.

Q. But they do appear on their behalf, given the power of attorney, and they appear on their behalf?

A. That's true.

Q. And examine witnesses and cross-examine witnesses and handle your case for you, do they not?

A. I don't believe this is their role.

Q. What is their role?

A. I am sorry, I can't tell you too well. They do anything that will be helpful in bringing to the review board's attention information that they feel is pertinent to the [fol. 224] process of the claim.

Q. These services are also conducted by the American Legion, Disabled Veterans and Veterans of Foreign Wars, are they not?

A. There are other accredited organizations that perform these duties.

Q. Mr. Schenkenberg, you testified there was a different method of operation between the Veterans Administration hospitals and military hospitals, and you never got to finish that statement. Would you finish that for me, please?

A. Well, as I said before, in the military hospital the Red Cross is the exclusive agency that the military expects to coordinate all volunteer recreation service to the hospitalized in a military hospital. The Veterans Administration has a different practice, and they—we are just one of any number of organizations that offer volunteer services in a Veterans Administration hospital and they have a Veterans Administration staff person who does the coordinating.

Q. In other words, other organizations are recognized as well to do this service, is that correct?

A. In the Veterans Administration.

Q. What are those organizations, do you know?

A. Well, they are the different veterans groups, American Legion, Veterans of Foreign Wars, DAV, can be any group, Lions Clubs.

[fol. 225] Q. Salvation Army?

A. Yes, sir.

Q. Is it not true that your employees receive no benefit, Federal benefit of any sort, other than a Social Security retirement?

A. Yes, sir.

Q. The Red Cross, to the best of your knowledge, has never received any appropriations from any state legislature?

A. No, sir.

Q. Is it not correct that your nurses, when they perform services in various states, obtain licenses in that state before they perform their services?

A. Yes, sir.

Mr. McKevitt: I have no further questions, Your Honor.

Mr. Massar: I have no further questions, if the Court please.

The Court: You may be excused.

Do you have anything further, counsel?

OFFERS IN EVIDENCE

Mr. Massar: I have no further witnesses. I do have further documents that I would like to introduce in evidence.

I offer in evidence at this time House Document No. 262, which has been marked Plaintiffs' Exhibit 19 for identification, the document being a message from the President of the United States transmitting to the Congress the Cumu- [fol. 226] lative Report on Refugees and Foreign Relief Operations, from July 1, 1940 through April 30, 1946.

A copy of this document has been lodged with counsel for the State.

A copy of the document which was I think No. 20 on the list appended to the pretrial order is also presently with the Court, and since this document which has been marked in evidence, marked for identification, represents the last copy from the archives of the American Red Cross, we would like permission if this is received in evidence to withdraw either the copy of the copy previously lodged with the Court.

The Court: Objections, counsel?

Mr. McKevitt: May I review it?

This is one of the ones on the pretrial order?

Mr. Massar: Yes, sir.

Mr. Currin: It was 18 there.

Mr. McKevitt: No, 19.

Mr. Currin: It was 18 on the pretrial order.

Mr. McKevitt: There is no argument on authenticity, a stipulation having been made.

We would argue on the grounds it is a hearsay document. The party giving the message, namely President Truman as I recall, is not here for cross-examination, and it is not an admissible document.

For such reason, our objection is so made.

[fol. 227] It is also a statement made to third persons which are not a party to this action.

Mr. Massar: This document being an official document of the United States—

The Court: It will be admitted. You may have permission to withdraw it and substitute a copy for it.

(Plaintiffs' Exhibit 19 was received in evidence.)

Mr. Massar: I offer at this time a document entitled "Foreign War Relief Operations", submitted by the American National Red Cross to the President of the United States, it being the final cumulative report on distribution by the American National Red Cross of relief supplies purchased with Government funds from July 1, 1940 through June 30, 1946.

Copies of this document have been furnished to counsel for the State.

A copy was lodged with the pretrial order as No. 19, and the document now offered has been marked for identification as Plaintiffs' Exhibit 20.

Three additional copies are now handed to the Court for its convenience.

The Court: Was this transmitted by the President to the Congress in the course of proceedings?

Mr. Massar: As is stated on the list appended to the pretrial order, this document was transmitted to the Congress [fol. 228] by President Truman on March 21, 1947, as is reported in the 93rd Congressional Record, at page 2423.

The Court: Any objections, counsel?

Mr. McKevitt: Your Honor, I will object once again. First of all, it is a report relayed by President Truman to the Congress, but it is also a report prepared or certified by the Chairman of the National Red Cross as to a report on particular activities.

Once again, it is a document between third parties, and I would object on that ground.

The Court: Well, we will consider it an official report. It will be admitted.

(Plaintiffs' Exhibit 20 was received in evidence.)

Mr. Massar: I offer in evidence at this time a document which has been marked as Plaintiffs' Exhibit 21 for identification.

It appears as Document No. 14 on the list appended to the pretrial order.

It is entitled "The Distribution of Government Owned Wheat and Cotton, Official Report by The American National Red Cross Covering the Disposal of Surplus Commodities in Aid of People in Distress as Authorized by Congress, 1932-33".

A copy of this document has been previously furnished to counsel for the State and a copy has been lodged with the clerk and two additional copies are now handed to the [fol. 229] Court for its convenience.

Mr. McKevitt: I have no objection, Your Honor.

The Court: It will be admitted.

(Plaintiffs' Exhibit 21 was received in evidence.)

Mr. Massar: I would ask the Court to now take judicial notice of Public Resolution No. 12, 72nd Congress, approved March 7, 1932, which appears in 47 Statutes at Large, page 61; Public Resolution No. 33, 72nd Congress, approved July 5, 1932, which appears in 47 Statutes at Large, page 605; Public Resolution No. 329, 72nd Congress, approved February 8, 1933, which appears in 47 Statutes at Large,

page 799; and, Public Resolution No. 647, 72nd Congress, approved March 3, 1933, which appears in 47 Statutes at Large, page 1544.

These are the resolutions pursuant to which the Red Cross undertook the activities on which it reported in the document received in evidence as Exhibit 21.

The Court: We will consider them.

Mr. Massar: At this time, I offer in evidence Proclamations issued by Presidents Taft, Wilson, Coolidge, Hoover, Franklin D. Roosevelt, Eisenhower, Kennedy and Johnson, which have respectively been marked for identification as Plaintiffs' Exhibits 22 through 29, copies of each of which have been furnished to counsel for the State and copies of each of which, except that of the Proclamation of President Johnson, which is marked Exhibit 29, have been furnished [fol. 230] to the Court, together with a pretrial order, and copies of each of which are now in the custody of the clerk of this court.

The Court: Is there any objection?

Mr. McKevitt: May I see Exhibit 29?

(Counsel perused exhibit.)

Mr. McKevitt: So far as all the exhibits except 29, Your Honor, are concerned, we have stipulated to the authenticity.

Exhibit 29 we have not stipulated on authenticity, so we would object on the grounds of authenticity on Exhibit 29.

So far as all these exhibits are concerned, including 29, these are all presidential proclamations, which I submit are hearsay in nature, irrelevant to the cause, and—

Mr. Massar: We submit, Your Honors, that each of the proclamations is relevant in that they indicate the position of the executive department the Government has taken with respect to the status of the American Red Cross.

The Court: Counsel, we will take judicial notice of all proclamations.

Mr. McKevitt: Your Honor, I am sorry, I didn't hear.

The Court: We will take judicial notice of all the proclamations that are listed, including 29.

Mr. Massar: This is an additional copy of 29, which I hand up for the convenience of the Court.

I offer in evidence at this time a document which the [fol. 231] clerk has marked for identification as Plaintiffs' Exhibit 30, it being a copy of a concurrent resolution of the 84th Congress, Second Session, which appears at 70 Statutes at Large, page B 32, dated June 6, 1956, passed by the Congress on the occasion of the 75th anniversary of the American National Red Cross, and which records that the Congress takes notice of the important work of the American Red Cross and of its position as an official agent of this government.

A copy of this resolution has been furnished to counsel for the State. A copy is in the hands of the clerk and three additional copies are handed up for the convenience of the Court.

The Court: What number is this on the pretrial?

Mr. Massar: 24.

Mr. McKevitt: We have no objection, Your Honor.

The Court: It will be admitted.

(Plaintiffs' Exhibit 30 was received in evidence.)

Mr. Massar: I now offer in evidence a document which the clerk has marked for identification as Plaintiffs' Exhibit No. 33, there being no Exhibits 31 and 32, which document is Report No. 1728 of the House of Representatives, 82nd Congress, Second Session, it being a report to accompany H. R. 7345, dealing with tax exemption accorded to sports programs conducted for the American Red Cross, and in which document the House of Representatives records its view that the American Red Cross is a quasi-[fol. 232] governmental agency.

Copies of this document have been provided to counsel for the State and copies are in the hands of the clerk of the court and three additional copies are now handed up for the convenience of the Court.

Mr. McKevitt: No objection, Your Honor.

The Court: It will be admitted.

Mr. Massar: On the pretrial order, that was Document No. 27.

(Plaintiffs' Exhibit 33 was received in evidence.)

Mr. Massar: I now offer in evidence documents which have been marked Plaintiffs' Exhibits 34, 35, 36, 37, 38 and 39 for identification, they being copies of documents numbered 28, 29, 30, 31, 32 and 33 on the pretrial and the list appended to the pretrial order, copies of each of which have been furnished to counsel for the State, copies of each of which are in the hands of the clerk of the court.

Each of those documents are rulings by the Internal Revenue Service according special tax benefit to the American Red Cross on the ground that it is an official agency of the United States.

Mr. McKevitt: I make an objection on those documents, Your Honor. I really feel these are hearsay documents. Once again, under the third party rule, I don't think they are admissible here. I think they have a purely hearsay [fol. 233] character by the fact that the party is not here for cross-examination. They are not made to parties to this action, and made to a third party, and for such reason I object to them.

Mr. Massar: Each of these documents is an official document of the United States, and as such is in the view of the plaintiffs admissible in evidence as relevant to the issue here, it bearing upon the view taken by the executive branch of this government as to the status of the American National Red Cross.

The Court: They will be admitted.

Mr. Massar: I have additional copies of each of these documents, which I hand up for the convenience of the Court.

(Plaintiffs' Exhibits 34, 35, 36, 37, 38 and 39 were received in evidence.)

Mr. Massar: At this time I offer in evidence a document which has been marked Plaintiffs' Exhibit 43 for identification, it being Document No. 4 on the list appended to the pretrial order, it being an opinion as to the status and duties of the American National Red Cross issued by John W. Davis, then Solicitor General of the United States and Counsellor of the American National Red Cross.

A copy of this document was furnised to counsel for the State. The copy is in the hands of the clerk of the court. Additional copies are here available for the convenience of the Court.

[fol. 234] Mr. McKevitt: I object on the ground that this is the opinion of one party, Your Honor, which is substitution for the determination by this Court as to the legal status of the party plaintiff, and as such is inadmissible.

The Court: It will be received for whatever it is worth.

(Plaintiffs' Exhibit 43 was received in evidence.)

Mr. Massar: I now offer in evidence a document which has been marked Plaintiffs' Exhibit 44 for identification, a copy of which has been furnished to counsel for the State, a copy of which is in the hands of the clerk, and copies of which I will hand up for the convenience of the Court, this document being a ruling by the Chief of the Army and Air Force Exchange Service as to the right of the American Red Cross to purchase gasoline and other motor fuels from the Army and Air Force Exchange Service without the payment of tax, it being offered as evidence of the view taken by the executive arm of the Government as to the status of the American National Red Cross.

The Court: Who issued the letter or ruling?

Mr. Massar: The Chief of the Army and Air Force Exchange Service.

The Court: I don't believe that's admissible, no.

Mr. Massar: At this time I offer in evidence documents which have been marked as Plaintiffs' Exhibits for identification Nos. 45, 46, 47, 48, 49, 51, 52, 53, 54, 55, 56, 57, 58,

[fol. 235] 59 and 60, there being no Exhibit 50, these documents having been previously numbered on the list attached to the pretrial order as 37, 38, 39, 41, 42, 47, 48, 49, 50, 51, 52, 54, 55, 56 and 61, copies of each of which have been furnished to counsel for the State and copies of each of which are in the hands of the clerk of the court and additional copies of all of which will be handed up for the Court's convenience, each of these documents being opinions by the Attorneys General of the States of Texas, California, Tennessee, Alabama, Georgia, New York, Ohio, New Mexico, Tennessee, Wisconsin, Georgia, Pennsylvania, Oregon, New York and Arkansas dealing with the exemption of the Red Cross either from taxes or from statutes requiring the registration of charitable organizations which solicit funds on the ground that the American National Red Cross as an agency of the United States is not subject to such taxation or regulation.

Mr. McKevitt: If Your Honor please, these are all Attorney General opinions as counsel pointed out of various states and relate to the interpretation of various states and have no bearing on the statute here or on the Colorado Employment Security Act as set forth in Chapter 62, 1953 Colorado Revised Statutes.

I think these matters are hearsay from the aspect they are addressed to a third party.

Secondly, they don't touch upon the issues we have here. [fol. 236] Three, they are merely personal opinions. Four, they are not Federal in that they are merely state agencies throughout the United States touching upon the Red Cross as it pertains to their particular state.

For such reasons, my objections are made.

The Court: Sustained.

Mr. Massar: I ask the Court at this time to take judicial notice of each of these rulings by the Attorneys General of the various states so that they may have them before them as authorities with which they may agree or disagree in reaching their conclusion in this case.

The Court: No, we will not accept them for that purpose.

Mr. Massar: I would observe at this point that though the rulings did deal with specific state statutes—

The Court: We made the ruling, counsel. Go ahead with the next exhibit.

Mr. Massar: I now offer in evidence documents which have been marked for identification as Plaintiffs' Exhibits 62, 63, 64, 66, there being no 65, 68 and 69, these same documents having been numbered 40, 43, 45, 58, 57—that is, No. 69 was numbered 57 on the pretrial order, on the list appended to the pretrial order. No. 68 was not listed on the list appended to the pretrial order, but a copy of that document has been furnished to counsel for the State.

[fol. 237] Each of these documents are rulings by the executive officers of various states and the District of Columbia other than Attorneys General as to the immunity of the American National Red Cross from tax statutes or solicitation statutes of the various states in which those officers held office.

Copies of each of these documents are in the hands of the clerk. Additional copies are here available for the convenience of the Court.

I offer these documents in evidence.

Mr. McKevitt: If Your Honor please, these are also, once again, opinions from state officials, some of whom are even in inferior status, if there be such, to Attorneys General. They are legal counsel, et cetera.

For such reasons and the reasons I gave in my last objection, I would reiterate my objections once again.

The Court: I think they are in the same category as the previous ones. The objection will be sustained.

Mr. Massar: I now offer in evidence a document which has been marked Exhibit 71 for identification.

I do not believe counsel has officially seen a copy of this document. I apprised him of it earlier this morning when we first obtained a copy of it.

I now hand it to him for his perusal, being an executive order of Governor John A. Love of the State of Colorado—

[fol. 238] The Court: Just hand it to him.

Mr. McKevitt: Your Honor, I have not seen it officially or unofficially. This is my first perusal. May I take a moment to read the document, Your Honor?

The Court: Yes.

(Counsel perused exhibit.)

Mr. McKevitt: May I see the original document, Your Honor? Is it tendered to the Court?

Mr. Massar: That's what I am tendering. I asked you to waive authentication of that document.

Mr. McKevitt: I object on several grounds. One, on authenticity. Two, it was not included in the pretrial order. Counsel was not given notice of the document within the period required by the Court.

Three, it is not an actual document. It is a copy. Fourth, it is a proclamation by the Governor, not by a Federal official of the United States.

The Court: It will be sustained.

I think the Court asked you to furnish opposing counsel copies during the noon hour.

Mr. Massar: I talked to counsel just before we left the courtroom and he said he didn't want to be bothered at that time. I told him I didn't want to have—

Mr. McKevitt: Your Honor, that's an incorrect statement. I hate to differ in front of the Court.

[fol. 239] The Court: Well—

Mr. Massar: I now offer in evidence the document which has been marked Plaintiffs' Exhibit 70 for identification, it being page 12797 of Volume 106 of the Congressional Record for June 22, 1962.

A copy of this page has previously been furnished to counsel for the State. A copy of it is appended to one of the affidavits or briefs previously submitted to the Court and the exhibits of which are listed as the documents with respect to which authentication was waived by the pretrial order.

The Court: Which one is it?

Mr. Massar: It is No. 1, I think. It may not—it is right at the beginning of the pretrial order. It may not be numbered.

Item 1, which says, "All pleadings and briefs and attachment thereto which have heretofore been filed."

The Court: Any objection?

Mr. McKevitt: Yes, Your Honor. May I examine the document?

Is this stipulated as to authenticity?

Mr. Massar: That's my understanding. That's been our understanding of the pretrial order.

Mr. McKevitt: You had it marked as Exhibit 70?

Mr. Massar: Item 1.

[fol. 240] The Court: Is this attached to the pleadings?

Mr. Massar: It is attached to—

The Court: An affidavit? What is it? Where did it come from? Is this part of the legislative history of the 1960—

Mr. Massar: It is, Your Honor.

The Court: It will be admitted.

Mr. McKevitt: May I make my objections for the record, Your Honor, on it?

The Court: Yes.

Mr. McKevitt: I object, first of all, on the grounds I do not see in the pretrial order where it was listed.

Mr. Massar: Mr. McKevitt, it is listed as No. 1.

The Court: He says it is part of the pleadings.

Can you tell us, has anybody found where it is yet?

Judge Arraj: I believe it is on page 8, isn't it?

Mr. McKevitt: My other objection is made on this basis, and I cite the case of Aldridge vs. Williams, 44 US, page 9.

I submit that what the purpose of this is, or I take it what the purpose of the tendering of this entry of the Congressional Record is for, is to clarify a statute which supposedly is ambiguous, and this goes to the latter point of our argument, after the instrumentality question, the question of whether or not Congress has waived the ques-[fol. 241] tion of Federal instrumentalities and has allowed the State of Colorado to go ahead and tax the plaintiff.

I submit it is clear, referring to Section 3305.

"In expounding this law, the judgment of the Court cannot, in any degree, be influenced by the construction

placed upon it by individual members of Congress in the debate which took place on its passage, nor by the motives or reasons assigned by them for supporting or opposing amendments that were offered. The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself; and we must gather their intention from the language there used, comparing it, when any ambiguity exists, with the laws upon the same subject, and looking, if necessary, to the public history of the times in which it was passed."

For such reason, my objection is so made, Your Honor.

The Court: It will be admitted.

(Plaintiffs' Exhibit 70 was received in evidence.)

Mr. Massar: I have since discovered perhaps I was misleading the Court and counsel when I said it was attached as an exhibit.

The fact of the matter is the relevant portions were quoted in page 8 of plaintiffs' memorandum in support of the motion for summary judgment.

[fol. 242] Additional copies are handed up at this time for the convenience of the Court.

At this time I would like to spread on the record the stipulation of the parties that in the event that this Court should rule that the American National Red Cross is entitled to refund of any contributions which it has heretofore made under the Colorado Unemployment Security Act that the parties will furnish to the Court the amount which they agree upon as the amount, proper amount, principal amount of refund.

The parties are confident that they will have no difficulty in arriving at that figure.

Do I have counsel's agreement?

Mr. McKevitt: We have no objection to that stipulation, Your Honor.

The Court: All right.

Mr. Massar: With that, Your Honor, plaintiffs have presented their case and rest.

Mr. McKevitt: Defendant rests, Your Honor.

The Court: All right. How much time do you think necessary for your argument, counsel?

Mr. McKevitt: I don't think it would take over 20 or 30 minutes, Your Honor. I mean, from our side of it.

Mr. Massar: I don't think we will need any more than that.

[fol. 243] The Court: A half an hour a side.

Mr. Massar: I would like to split that, if I may, between direct presentation and rebuttal.

The Court: Yes. We will take a short recess before you begin, to get organized.

(The Court recessed from 2:35 o'clock p.m. until 2:47 o'clock p.m.)

(Closing arguments were presented; whereupon, at 3:55 o'clock p.m. the proceedings were concluded.)

Reporter's Certificate (omitted in printing).

[fol. 244]

SUPREME COURT OF THE UNITED STATES

No. 1071—October Term, 1965

Department of Employment, et al., Appellants,

v.

United States, et al.

Appeal from the United States District Court for the District of Colorado.

ORDER POSTPONING JURISDICTION—May 23, 1966

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits and the case is placed on the summary calendar.